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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DOW JONES & COMPANY, INC.
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
NATIONAL NEWSPAPER ASSOCIATION
ASSOCIATION OF AMERICAN PUBLISHERS, INC.
RECORDING INDUSTRY ASSOCIATION OF AMERICA
Petitioners,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners Dow Jones & Company, Inc., American Newspaper Publishers Association, National Newspaper Association, Association of American Publishers, Inc., and The Recording Industry Association of America, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 8, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at —— F.2d ——, and appears at Appendix A of the Appendix hereto. The Decision of the Governors of the United States Postal Service, dated May 19, 1978, approving the Recommended Decision of the Postal Rate Commission appears at Appendix B of the Appendix hereto. The Opinion and Recommended Decision of the Postal Rate Commission, issued May 12, 1978, in Docket No. 77-1 is contained in two volumes submitted as a supplemental appendix.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on June 8, 1979, and this petition for certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Postal Reorganization Act's ratemaking principles [§ 3622(b)] and its "fair and equitable" allocation standard [§ 101(d)], require the Commission to use a particular costing methodology emphasizing only one of nine statutory factors to the virtual exclusion of those that the Commission had considered appropriate?

2. Whether the persistent and continuing requirement by the court below that the Commission abandon its ratemaking methodology in favor of allocation methods preferred by the court, misconstrues the statute, frustrates the legislative purpose and constitutes unwarranted intrusion by the court below into the administrative process?

STATUTORY PROVISIONS INVOLVED

Appendix C contains the relevant statutory provisions of the Postal Reorganization Act of 1970 (Public Law No. 91-375, 84 Stat. 719 *et seq.*) which is codified at 39 U.S.C. § 101 *et seq.* Two provisions are especially pertinent:

§ 101 Postal Policy

* * *

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

§ 3622 Rates and Fees

* * *

(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

STATEMENT OF THE CASE

This petition challenges the validity of the decision of the court of appeals which qualifiedly affirmed the order of the Governors of the United States Postal Service (Postal Service Governors) approving the May 12, 1978 decision of the Postal Rate Commission providing for increases in postal rates and fees. It presents fundamental issues concerning standards to be followed by the Commission in apportioning costs among mail users, and concerning the proper relationship between the agencies and the courts of appeals.

The statutory procedure for determining postal rates is provided in the Postal Reorganization Act of 1970, 39 U.S.C. §101 *et seq.* (Act), enacted following extensive legislative consideration of proposals by The President's Commission on Postal Organization (Kappel Commission) which had submitted its report to the President in 1968.[1] The Act substituted for the long-established Post Office Department, the Postal Service, directed by a Board of Governors, and created the Postal Rate Commission as an "independent establishment of the executive branch of the Government," 39 U.S.C. § 3601. The Commission consists of five Commissioners appointed by the President with the consent of the Senate, for terms of 6 years, 39 U.S.C. § 3602.

Proceedings to increase postal rates are initiated by the Postal Service. Following evidentiary proceedings conducted by the Commission in which numerous parties including the Commission's Staff participate, the Commission issues a recommended decision which, upon adoption by the Governors, is subject to judicial review, 39 U.S.C. § 3628.

This case involves the fourth general postal rate increase proceeding decided by the Commission under the new Act. In each instance, review petitions were filed in the United States Court of Appeals for the District of Columbia Circuit. Although the administrative proceedings dealt with both the level of the revenue requirement for the Postal Service and the apportionment of the costs among the various classes of mail users, the major area of controversy before the Commission and in judicial reviews involves the latter—the allocation and rate design issue.

The first proceeding (Docket No. R70-1) establishing the 8-cent rate for first-class mail was affirmed by

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[1] *Towards Postal Excellence,* The Report of The President's Commission on Postal Organization, June 1968.

the court of appeals in 1973.[2] The concurring opinion in which all members of the panel joined, expressed disagreement with the Commission's apportionment formula; the court was dissatisfied with the Commission's failure to attribute or assign larger proportions of the overall costs to particular classes, in order to minimize the remaining revenue requirement which is allocated on the basis of the non-cost factors specified in the Act. (id. at 777-779).

The second proceeding (Docket No. R74-1), prescribing 10-cent first-class postage, in which the Commission performed the allocation and rate design steps by attributing costs on the basis of variability and inverse elasticity, was also reviewed by the court of appeals,[3] with what amounted to a directive for future cases that the Commission revise the formulae and maximize the proportion of costs attributed and assigned without reference to the non-cost factors specified in the Act. The concurring opinion expressed apprehension, later confirmed in this case, that the court's analysis would "leave the remaining seven subsections, the so-called non-cost factors, practically devoid of any real meaning or application" (569 F.2d 570, at 603) That case, referred to as *NAGCP I,* is discussed further below.

The third postal rate proceeding (Docket No. R76-1), fixing the 13-cent rate for first class, decided by the Commission in 1976, was pending judicial review

[2] *Association of American Publishers, Inc., et al.,* v. *U.S.P.S.,* 485 F.2d 768.

[3] *National Association of Greeting Card Publishers, et al.,* v. *U.S.P.S.,* 569 F.2d 570 (1976), vacated as to other issues, 434 U.S. 884 (1977).

in *NAGCP II* when *NAGCP I* was decided. The *NAGCP II* review proceedings were dismissed for mootness upon commencement of the next rate proceeding.[4]

The present proceeding was initiated on July 13, 1977, when the Postal Service filed its request under § 3622 for further increases in postage and fees. Evidentiary hearings were conducted over a period of 62 sessions before the Commission *en banc,* culminating in the two-volume Opinion and Recommended Decision issued May 12, 1978. Numerous consolidated review proceedings, in which petitioners participated,[5] resulted in the judgment and opinion of June 8, 1979 in *NAGCP III* which is the subject of this petition.

[4] *National Association of Greeting Card Publishers* v. *U.S.P.S.,* No. 76-1611 (D.C. Cir.), dismissed.

[5] American Newspaper Publishers Association is a trade association of newspapers with over 1340 members representing more than 90 percent of the daily and Sunday newspaper circulation in the United States.

National Newspaper Association is an organization of some 500 smaller-city daily and 5,500 weekly newspapers with members in each of the 50 states and the District of Columbia.

Dow Jones is the publisher of the *Wall Street Journal* and *Barron's,* and is the largest newspaper mailer using the Postal system; it also utilizes private delivery services.

The Association of American Publishers, Inc. is a non-profit organization with a membership of 320 publishing organizations including publishers of trade books, school and college textbooks, book clubs, and publishing departments of religious denominations.

The Recording Industry of America, Inc. is a non-profit organization of more than 50 members who produce 90 percent of the phonograph records and pre-recorded tapes purchased and sold in the United States.

The Commission's Decision

In Docket No. R77-1 involved here, the Commission permitted the Postal Service to increase its rates by $1.9 billion on the basis of an overall revenue requirement of $17.6 bililon, and approved the 15-cent rate for first-class postage. Except for one major issue, concerning whether past losses of the postal system could be included as a revenue requirement recoverable from future mail users, the major portion of the Commission decision dealt with the contested issues involving apportionment of costs among the several classes.

In its decision (cited as "PRC Opinion," and set forth in the Supplemental Appendix), the Commission felt bound by the disapproval of the court of appeals in *NAGCP I* of the methodology employed in the Commission's two most recent rate determinations, which it interpreted as holding that the Act requires increased attribution and assignment of costs on the basis of "inferences of causation," thus minimizing the amount subject to Commission judgmental or discretionary allocation through application of the other statutory criteria of the Act (PRC Opinion, p. 8). The Commission felt obliged by the court's "directives" to develop formulae to attribute or assign to particular classes all costs "*potentially* subject to tracing" (id at 9).

The Commission interpreted the court's directive in *NAGCP I* (1) to require increases in the proportion of costs classified as "attributable" due to the court's insistence upon "extended attribution" (id. at 80-82); (2) to require an increase in the proportion of costs classified as "assignable" due to the court's insistence upon "cost of service allocation" (id. at 87-88); and (3) to require reduction in the overhead and institutional costs category (redesignated by the court as "residuum"), so as to restrict the use of the statutory judgmental and discretionary apportionment criteria (id. at 157-8).

The pervasive nature of these required changes resulted in (1) severe diminution to the Commission's chosen "marginal cost pricing" methodology (id. at 80-1); (2) elimination from judgmental or discretionary allocation as to costs for which "inferences or causation" could be discerned (id. at 122); and (3) virtual rejection of the Commission's preferred "inverse elesticity" rate design methodology (id. at 168).

Under the court's compulsion, the Commission further felt obliged to utilize a hypothetical costing concept based on the assumption that since some classes of mail can be deferred for as long as two days in delivery, whereas other classes are supposed to be delivered upon receipt, the latter should be assigned the costs resulting from operating the postal system on a six-day per week basis, beyond the costs which a hypothetical postal system would incur if mail deliveries were made only three days per week. The preferential classes to which these additional costs were assigned include not only first-class mail, but a number of subclasses of second-, third-, and fourth-class mail, including publications which qualify for newspaper treatment. The result was to assign $1.3 billion of so-called "service-related costs" to these mailers in addition to the costs for which they are directly responsible (id. at 156).

Because the constraints imposed upon the Commission by *NAGCP I* required the creation of new formulae and deprived it of ratemaking and allocation

methods in which the Commission had greater confidence, its decision expresses frustration and disappointment; the Commission believes that the new methods are inferior to the old, and that they are not required by the statute (p. 8-10; 14-15; 75-76; 168-69). It states (p. 75-76):

> "Of course, we do not intend any departure here from our R76-1 method to imply that we desire to abandon that method. We continue to believe that the departures required by the Court are not required by the Act, and are difficult to implement on economic grounds. Nevertheless, we must follow the Court's ruling, and faithfully apply its interpretation of our statute; and this we have done."

The Postal Service Governors Order

Under § 3625 of the Act, the ultimate administrative decision in a postal rate proceeding is that of the Postal Service Governors upon review of recommended decisions by the Commission. In this case, the order of the Postal Service Governors reiterates its approval of the costing and pricing principles in the preceding rate cases, condemned by the court below in *NAGCP I,* and explains (Appendix B3):

> "In this connection, we strongly endorse the Commission's views on the bearing of the Court's Decision in *NAGCP I* on this proceeding; we agree with the Commission's statement that it does not intend its departure in this case from its costing methodology in the previous case to imply a desire to abandon that methodology; and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act."

The Court of Appeals Opinion

The court below, treating the Commission's decision as a response to the court's "mandate" in *NAGCP I,*[6] found that it constituted a constructive interaction between the agency and the court warranting affirmance (Appendix A12), but only upon the premise that "further improvements" will be made (id. at 59, 95). The court took note of the Commission's lament of being precluded from utilizing its own ratemaking and allocation principles. Stating, "We are concerned that it may reflect a hostility to our [*NAGCP I*] opinion that has resulted in an application first grudging and then inconsistent" (id. at 24), the court proceeded to reiterate its prior criticisms of the Commission's preferred methodology.

With extensive citation to *NAGCP I,* the court again criticized the Commission's use of cost variability in performing the statutory attributions (id. at 16); extensively disparaged the marginal cost pricing effort which *NAGCP I* had frustrated (id. at 23-5); and again "condemned the overt use of 'value of service criteria'" (id. at 52).

Similarly, the court restated its insistence upon the use of "extended attribution" (id. at 20); the enlargement of assignable costs through inferences of causation (id. at 21); and the obligation to apply so-called "cost-of-service" allocation formulae (id. at 19).

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[6] *National Association of Greeting Card Publishers, et al.,* v. *U.S.P.S.,* 569 F.2d 570 (1976), vacated as to other issues, 434 U.S. 884 (1977).

REASONS FOR GRANTING THE WRIT

I. The Regulatory Framework Created to Establish Rates for the National Postal System Presents Issues that Merit Consideration by the Court

The creation of the United States Postal Service and the regulatory framework for initiating, determining, and implementing postal rates originated with the Postal Reorganization Act of 1970. Despite the relatively recent origin of this framework, four major postal rate increase proceedings have been conducted, concluded and subjected to judicial review under this statute. Because of the rapid sequence of new rate cases, this is the first to be presented for consideration by the Court. However, the issues warranting its consideration are now well focused as a result of considerable experience with the new system and the sharply contested nature of the several administrative and judicial proceedings below.

Postal rate proceedings conducted before the Commission involve particularly large financial questions. In the proceeding under review here, rates and fees were approved which will yield approximately $17.6 billion annually (PRC Opinion p. 154). This represents the revenue requirement of the Postal Service. The rate increase alone amounts to $2.4 billion annually (id. at 19), essentially the same magnitude as the rate increases involved in the two prior cases.

The decision of the court below substantially affects the future willingness or even the financial ability of postal users—both individuals and businesses—to employ the mails. Moreover, since the issues involve the basic methodology for apportioning the cost burden among the various classes of mail users, and in view of

the certainty of additional rate increase proceedings in which these principles will be applied, the case is immensely important both in its own right and as the basic precedent for the future.

The exceptional importance of the case derives largely from the difference in viewpoint between the court below and the postal regulatory agencies concerning both the conceptual framework and economic basis for the postal rate structure—a structure that channels $1.5 billion per month in postage payments from tens of millions of mailers. The principles at issue foreshadow multi-million dollar dislocations in the apportionment of postal costs among mail users, and significant consequences for mail volume, for the nature and function of the national postal system, and for significant parts of the national economy.

The basic difference between the Commission and the court below involves the fundamental issue whether fully allocated costs are to be imposed upon all classes of mail users or whether instead, the statutory market and demand considerations are to be given significant weight. The court's insistence upon distributing postal costs without significant regard to market or demand factors causes mailers impacted by the changed methodology and relatively greater cost burden, increasingly to utilize alternative means of delivery, outside the postal system. This is especially true of newspaper and magazine publishers which represent major segments of second-class mail and book publishers and

producers of sound recordings which represent major segments of special rate fourth-class mail.[7]

The consequences involve not only loss of this business to the postal system and the fall-off in revenue, but a shifting of the entire cost to inelastic mail users which are incapable of transferring to other services; the fixed costs of the postal system are thus spread over a lesser remaining volume of mail.

In response to persistent and increasing pressure from the court of appeals, the agencies charged with responsibility for postal rates attempted to refine and improve their methodology, rather than abandon it. Under the decision of the court below, this will no longer be possible. In the absence of review by the Court of this case, the Postal Service, the Postal Rate Commission, and the Postal Service Governors will be unable to utilize their preferred principles and methodology.

This case, therefore, represents the critical point in the history of postal reform under the statutory scheme formulated by Congress in the Postal Reorganization Act. There is now an adequate history of Commission rate determinations and judicial intervention so as clearly to present the disparate views of the Commission and the court below for scrutiny by this Court.

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[7] This proposition is supported by a section of the Commission Opinion entitled "Alternative Delivery Issues" (pp. 292-302), resulting in findings that increased volumes of mail will continue to be lost by the Postal system to other forms of delivery because of cost considerations. The court below did not discuss this issue stating that the "factual condition" was not developed in the record on review (Appendix A27, fn. 29).

II. The Actions of the Court Below Constitute an Extreme Intrusion into the Administrative Process that Warrants Review by the Court

It is apparent from the decision below, and from the two earlier postal rate cases, that the court of appeals has assumed a direct participatory role in the postal ratemaking function. The agency's order here is not the product of the Commission's own deliberations nor the application of its expertise because it was instructed by the mandate in *NAGCP I* to disregard the ratemaking and allocation principles which the Commission believes appropriate and called for under § 3622(b) of the Act. The court below acknowledges this, but justifies it on grounds that the Commission had been misapplying the statutory standard. That evaluation does not withstand scrutiny, as we demonstrate in Part III. But even if the Commission's perception, and that of the Postal Rate Governors were wrong, the actions of the court below in formulating a different type of rate apportionment methodology and in preventing the Commission from applying its own expertise, are so intrusive and so flagrant as to warrant review by the Court.

In *NAGCP I* the court "condemned" the Commission's interpretation of its governing statute (Appendix A52); "rejected" the Commission's cost allocation and rate design methods (Appendix A27); and "held" that the Commission must not use "cost variability as the key to attribution nor . . . demand theory as a premise for allocation of unattributed costs . . ." (569 F.2d 570 at 593).

Under well-established principles of this Court, the function of the reviewing court ends when an error of law is laid bare, *FPC* v. *Idaho Power Co.*, 344 U.S. 17,

20 (1952); and it is wholly inappropriate for the court to proceed further to exercise an essentially administrative function (*supra* at 21), as was done forcefully and repeatedly by the D.C. Circuit. e.g., the decision below reproduces its summary of its *NAGCP I* instruction (Appendix A21):

> "[T]he Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably be assigned to each on the basis of best available cost of service estimates. The residuum of costs is subject to discretionary allocation in accord with the non-cost factors set forth in the Act."

The court has thus bound the Commission to the service of the court's "combination of formulas,"[8] and imposed its own concept of apportionment methodology. But, selection by a commission of a ratemaking method must be based on *its* judgment as to matters of economic policy. "It is precisely to permit such judgments that the task of regulating . . . rates has been entrusted to a specialized administrative agency rather than to courts of general jurisdiction." *American Commercial Lines, Inc.* v. *Louisville & N.R. Co.*, 392 U.S. 571, 590 (1968).

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[8] *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589-90, 601-604 (1945).

We recognize, of course, that the court below clothed its explicit rate allocation instructions in the form of statutory interpretation; however, the Act contains no such detail and its provisions contradict rather than validate the formula mandated by the court. In any event, this Court has repeatedly ruled that lower courts should defer to an agency's construction of its own statutory mandate, *Board of Governors, etc.*, v. *First Lincolnwood*, 439 U.S. 234, 251-52 (1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Although the court below concluded that the ratemaking provision at issue here "is susceptible of a variety of interpretations."[9] it has totally overlooked the requirement that the agency charged with administration of a statute must be permitted to follow its own interpretation unless it is demonstrably wrong. *Udall* v. *Tallman*, 380 U.S. 1, 17 (1965).[10]

Particularly is this true "when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Development Co.* v. *International Union of Electricians*, 367 U.S. 396, 408," quoted in *Udall* v. *Tallman, supra* at 16.

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[9] *NAGCP I, supra;* at footnote 54, quoting the court's opinion in *American Publishers, supra;* 485 F.2d at 779.

[10] In the *Udall* case, this Court stated, "To sustain the Commission's application of this statutory term we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in a judicial proceeding."

The decisions below also transgress the frequently expressed principle that precludes elevating a reviewing court's methodology above the expertise of the regulatory agency. *Consolo* v. *FMC,* 383 U.S. 607, 620-621 (1966); *SEC* v. *Chenery,* 332 U.S. 194, 196 (1947). This prohibition is directly pertinent to cost allocation methods applied by ratemaking agencies. See *Colorado Interstate Gas Co.* v. *U.S., supra* at 833, in which the Court emphasized that "allocation of costs is not a matter for a slide-rule," but of judgment which is to be exercised by the Commission rather than the reviewing court.

The court below has gone much further; it has not only used its own methodology to evaluate the Commission's results, but has "mandated" that the Commission adopt and apply it in designing rates. This represents an even plainer instance of "unjustifiable intrusion into the administrative process" than recent examples such as its decision in *Aeschliman* v. *NRC,* 547 F.2d 622 (1976); and *Natural Resources Defense Council* v. *NRC,* 547 F.2d 633 (1976)) which were reversed by *Vermont Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519 (1978), quoted above.[11]

Finally, as set forth in the Statement, *ante, NAGCP I* imposed such stringent instructions as to the results demanded in subsequent postal rate proceedings that the Commission had no choice but to comply. In so doing, both the Commission and the Postal Rate Governors expressly disavowed author-

[11] See also *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326, 332-34 (1976); and *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 809-12 (1978).

ship or approbation for the ratemaking methodology in this case. The characterization by the court below of this sequence of events, as "constructive interaction between the Postal Service and this court" (Appendix A12), does not diminish the extreme intrusion which it forced upon the administrative process in this case. This is, therefore, an appropriate matter for review of the Court.

III. The Decision Below Seriously Alters the Postal Reorganization Act

The Act provides for apportionment of postal costs on a "fair and equitable" basis [§ 101] and specifies in considerable detail nine factors which *shall* be used by the Commission in its rate determination [§ 3622 (b)]. The decision below, however, designates one of the statutory factors as "the crucial criterion," and measures the Commission's performance against the standard of total concentration upon this single factor (Appendix A15). This unique interpretation, which reads out of the ratemaking process almost totally the eight other factors which the statute prescribes,[12] will constitute a permanent engraftment on the ratemaking section of the Act.

Although, in other circumstances, such an infirmity might be correctable in the next or in subsequent rate proceedings, that remedy is scarcely possible due to the fact that the Commission was instructed in *NAGCP I* to apply this interpretation; and unless freed from this

[12] The decision below indicates that the remaining criteria are to be applied only to the "residuum" of costs (Appendix A20) which must under the court's instructions be reduced in future cases to a level less than the 7.14 percent residuum achieved in this proceeding (Appendix A28).

shackle now, there is virtually no possibility the Commission, the Postal Service Governors or any party would be permitted to raise the issue again.

The issue is not simply that of a difference in philosophy between causal apportionment versus fully allocated cost principles.[13] The court's requirement that the distribution of the cost burden of the postal system be imposed among classes of mailers through the use of this single factor "to the greatest extent possible" (Appendix A19) shifts the focus of the statute from its plain terms, to one in which the experience of the Postal Service; and the expertise of the Commission; and the judgment of the Postal Service Governors are reduced to the almost mechanical exercise of applying a formula. This is confirmed by the fact that the court below expressed satisfaction that the development of the "service-related cost" formula constitutes compliance with its mandate. Thus, the postal regulatory

[13] The premise of the decision below is that the Commission is required to use the fully allocated cost theory, apparently without recognition that this was the methodology used in the Cost Ascertainment System of the old Post Office Department, which was abolished by the Act. The court posits that the objective of the Act is to apportion to particular mail classes on a formulary or non-judgmental basis to the fullest extent possible the total costs of the postal system, leaving very little to be allocated through the use of the eight statutory factors. This is inconsistent with the underlying purpose, legislative history, textual structure and administrative interpretation of the statute. From the inception, it was recognized that the portion of the costs which can be causally identified with classes of mail constitute no more than half of the total system costs (See Kappel Commission Report, p. 131). And, far from requiring the use of fully allocated costing, that requirement was expressly rejected in order that the new Postal Rate Commission would have freedom to develop its own method in accordance with the specified criteria. (S. Rep. No. 91-912, 91st Cong., 2d Session, p. 10, 1970)

agencies are relegated to the refinement of the "three-day postal service" hypothetical model, in place of applying the statutory factors such as: value of service; rate impact; alternative delivery; mail preparation and cost-saving services; and educational, cultural, scientific and informational values, [§ 3622(b)].

The statutory issue presented merits consideration by the Court.

CONCLUSION

The petition for a writ certiorari should be granted.

Respectfully submitted,

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August 31, 1979

APPENDIX

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APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

No. 78-1448, *et al.*

National Association of Greeting Card Publishers, et al. v. *United States Postal Service*

(NAGCP III)

June 8, 1979

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1448

* NATIONAL ASSOCIATION OF
GREETING CARD PUBLISHERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
COUNCIL OF PUBLIC UTILITY MAILERS,
GROWERS & SHIPPERS LEAGUE OF FLORIDA, ET AL.,
ASSOCIATED THIRD CLASS MAIL USERS,
AMERICAN BANKERS ASSOCIATION,
AMERICAN BUSINESS PRESS, INC.,
MAGAZINE PUBLISHERS ASSOCIATION, INC.,
DIRECT MAIL/MARKETING ASSOCIATION, INC.,
READER'S DIGEST ASSOCIATION, INC.,
AMERICAN COUNCIL ON EDUCATION,
UNITED PARCEL SERVICE OF AMERICA,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
and the NATIONAL NEWSPAPER ASSOCIATION,
DOW JONES & COMPANY, INC.,
NATIONAL FOUNDATION—MARCH OF DIMES,
UNITED PARCEL SERVICE OF AMERICA, INC., INTERVENORS

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* For convenience the court will refer to this case hereafter as National Association of Greeting Card Publishers v. USPS [Fourth Postal Ratemaking].

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petition for Review of an Order of
the United States Postal Service

No. 78-1449

NATIONAL ASSOCIATION OF
GREETING CARD PUBLISHERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE, APPELLEE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1453

NATIONAL ASSOCIATION OF
GREETING CARD PUBLISHERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE, APPELLEE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1483

TIME INCORPORATED, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

Petition for Review of an Order of
the United States Postal Service

No. 78-1484

TIME INCORPORATED, APPELLANT

v.

UNITED STATES POSTAL SERVICE

Appeal of an Order of the
United States Postal Service

No. 78-1494

GROWERS AND SHIPPERS LEAGUE OF FLORIDA,
and FLORIDA GIFT FRUIT SHIPPERS ASSOCIATION,
APPELLANTS

v.

UNITED STATES POSTAL SERVICE, APPELLEE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1509

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION and
NATIONAL NEWSPAPER ASSOCIATION, PETITIONERS

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

Petition for Review of an Order of
the United States Postal Service

No. 78-1517

AMERICAN BUSINESS PRESS, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

Petition for Review of an Order of
the United States Postal Service

No. 78-1518

AMERICAN BUSINESS PRESS, INC., APPELLANT

v.

UNITED STATES POSTAL SERVICE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1531

MAGAZINE PUBLISHERS ASSOCIATION, INC., APPELLANT

v.

UNITED STATES POSTAL SERVICE

Notice of an Appeal of an Order of
the United States Postal Service

No. 78-1532

MAGAZINE PUBLISHERS ASSOCIATION, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

Petition for Review of an Order of
the United States Postal Service

No. 78-1683

STATE OF MAINE, STATE OF INDIANA, STATE OF FLORIDA,
STATE OF RHODE ISLAND, STATE OF WASHINGTON,
and STATE OF ARKANSAS, PETITIONERS

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

AMERICAN BUSINESS PRESS, INC.,
STATES OF UTAH, IOWA AND ILLINOIS,
DIRECT MAIL/MARKETING ASSOCIATION, INC.,
MAGAZINE PUBLISHERS ASSOCIATION, INC.,
READERS DIGEST ASSOCIATION, INC.,
TIME, INC. & UNITED PARCEL SERVICE OF AMERICA, INC.,
ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
MAIL ORDER ASSOCIATION OF AMERICA,
PARCEL SHIPPERS ASSOCIATION,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION &
NATIONAL NEWSPAPER ASSOCIATION,
DOW JONES & CO., INC., INTERVENORS

Petition for Review of an Order of
the United States Postal Service

No. 78-1684

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

MAGAZINE PUBLISHERS ASSOCIATION, INC.,
TIME INCORPORATED,
UNITED PARCEL SERVICE OF AMERICA, INC.,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
NATIONAL NEWSPAPERS ASSOCIATION,
STATE OF CONNECTICUT,
DIRECT MAIL/MARKETING ASSOCIATION, INC.,
DOW JONES & CO., INC., INTERVENORS

Petition for Review of an Order of
the United States Postal Service

Argued December 7, 1978

Decided June 8, 1979

Michael B. Meyer, Assistant Attorney General, Commonwealth of Massachusetts, with whom *Francis X. Bellotti*, Attorney General, and *Garrick F. Cole*, Assistant Attorney General, Commonwealth of Massachusetts, and *Donald G. Alexander*, Deputy Attorney General, State of Maine, were on the brief, for petitioner, State of Maine, et al. in Nos. 78-1683 and 78-1684.

Douglas Green with whom *Matthew S. Perlman* and *Charles B. Ruttenberg* were on the brief, for appellant, National Association of Greeting Card Publishers, in Nos. 78-1448, 78-1449 and 78-1453.

Richard Littell with whom *Scott M. DuBoff* was on the brief, for petitioners, American Newspaper Publishers Association, et al. in No. 78-1509 and intervenor in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1517, 78-1518, 78-1531, 78-1532, 78-1683 and 78-1684.

John M. Burzio with whom *Louise C. Powell* and *Justin R. Wolf* were on the brief, for petitioners/appellants Time Incorporated and Magazine Publishers Association, Inc. in Nos. 78-1583, 78-1448, 78-1531 and 78-1532 and intervenor in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1509, 78-1517, 78-1518, 78-1683 and 78-1684.

Robert A. Saltzstein, for petitioner/appellant American Business Press, Inc. in Nos. 78-1517 and 78-1518 and intervenor in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1509, 78-1683 and 78-1684.

Maxwell W. Wells, Jr. for appellants Growers and Shippers League of Florida, et al. in No. 78-1494 and intervenor in Nos. 78-1448, 78-1449, 78-1683 and 78-1684.

Frances G. Beck, Assistant General Counsel, United States Postal Service, with whom *John L. DeWeerdt*, Associate General Counsel, *Frank R. Heselton* and *William L. Fang*, Attorneys, United States Postal Service, were on the brief, for respondent.

Also *Ronald R. Glancz*, Attorney, Department of Justice, entered an appearance for respondent.

Timothy J. May, for intervenor Reader's Digest Association, Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1509, 78-1683 and 78-1684.

Robert L. Kendall, Jr. with whom *Bernard G. Segal* and *John E. McKeever* were on the brief, for intervenor, United Parcel Service of America, Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1509, 78-1517, 78-1518, 78-1531, 78-1532, 78-1683 and 78-1684.

Arthur B. Hanson was on the brief, for intervenor, American Newspaper Publishers Association in No. 78-1448.

W. Terry Maquire was on the brief for intervenor, National Newspaper Association in No. 78-1448.

Paula A. Jameson was on the brief, for intervnor, Dow Jones and Co., Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1509, 78-1517, 78-1518, 78-1531, 78-1532, 78-1683 and 78-1684.

Richard M. Schmidt, Jr., Ian D. Volner and *Ruth S. Baher* were on the brief, for intervenors, The Association of American Publishers, Inc. and Recording Industry Association of America, Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1683 and 78-1684.

Also *Eugene E. Threadgill* entered an appearance for intervenor The Council of Public Utility Mailers in Nos. 78-1448, 78-1449, 78-1683 and 78-1684.

Also *J. Edward Day* entered an appearance for intervenor, Associated Third Class Mail Users in Nos. 78-1448, 78-1449, 78-1453, 78-1683 and 78-1684.

Also *Kenneth Wells Parkinson* and *William J. Olson* entered appearances for intervenor National Foundation —March of Dimes in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484 78-1494, 78-1509, 78-1517, 78-1518, 78-1683 and 78-1684.

Also *William H. Smith* and *Michael F. Crotty* entered appearances for intervenor, American Bankers Association in Nos. 78-1448, 78-1449, 78-1453, 78-1683 and 78-1684.

Also *Dana T. Ackerly* and *David A. Levitt* entered appearances for intervenor, Direct Mail/Marketing Association, Inc. in Nos. 78-1448, 78-1449, 78-1453, 78-1483, 78-1484, 78-1494, 78-1509, 78-1517, 78-1518, 78-1531, 78-1532, 78-1683 and 78-1684.

Also *David C. Todd* entered an appearance for intervenors, Parcel Shippers Association and Mail Order Association of America in Nos. 78-1449, 78-1453, 78-1483, 78-1484, 78-1494 and 78-1509.

Also *Francis R. Cawley* entered an appearance for intervenor, Agricultural Publishers Association, Inc. in Nos. 78-1517 and 78-1518.

Before TAMM and LEVENTHAL, *Circuit Judges*, and WILLIAM B. BRYANT,* *Chief Judge*, United States District Court for the District of Columbia.

Opinion PER CURIAM.

Opinions for the Court filed by Circuit Judges LEVENTHAL and TAMM.

PER CURIAM: In these cases the court reviews and affirms orders of the Board of Governors of the United States Postal Service approving a recommended decision of the Postal Rate Commission on increases in postal rates and fees. There are two opinions for the court. Judge Leventhal's opinion recounts the background of the litigation and considers the various objections of the parties to the cost allocation approaches of the Postal Service. Judge Tamm's opinion deals with claims that the Governors and Commission erred 1) in rejecting a proposed first-class "citizens' rate;" 2) in including in revenue requirement an item to recover past losses incurred by the Service; and 3) in imposing "constraints" on parcel post rates found to be otherwise cost-justified.

LEVENTHAL, *Circuit Judge*: In this case the court again has occasion to consider the response of the United States Postal Service ("USPS" or "Postal Service") to the "special, and quite demanding, ratemaking require-

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

ments" [1] of the Postal Reorganization Act of 1970 ("Act")[2] and to this court's views concerning those requirements.

This case arises from the fourth general ratemaking proceeding under the Act. Our principal focus here, as in our cases reviewing earlier ratemaking proceedings,[3] is on the methods by which the Postal Service, in setting the rates for the various classes of mail, allocates its costs among those classes. In particular, we must assess the Postal Service's "service related cost" methodology, by which it undertook—in response to this court's mandate in *National Association of Greeting Card Publishers v. USPS* [*NAGCP I*][4]—to assign to certain classes

[1] National Ass'n of Greeting Card Publishers v. USPS [*NAGCP I*], 186 U.S.App.D.C. 331, 336, 569 F.2d 570, 575 (1976), *vacated as to other issues*, 434 U.S. 884 (1977).

[2] Pub. L. No. 91-375, 84 Stat. 719.

[3] *NAGCP I*, *supra*; Association of American Publishers, Inc. v. Governors of USPS, 157 U.S.App.D.C. 397, 485 F.2d 768 (1973). *American Publishers* reviewed the first general ratemaking, Docket No. R71-1, the central feature of which was the adoption of the 8 cent first-class rate. *NAGCP I* reviewed Docket No. R74-1, which established the 10 cent first-class rate. In the third general ratemaking proceeding, Docket No. R76-1, the 13 cent first-class rate was adopted. While petitions for review and appeals of Docket No. R76-1 were pending before this court, the decisions in the instant ratemaking proceeding, Docket No. R77-1, were entered; consequently, the Docket No. R76-1 proceedings were dismissed for mootness. *But see NAGCP I*, *supra*, 186 U.S.App.D.C. at 339 n.21, 569 F.2d at 578 n.21 (shortness of postal ratemaking cycle suggests controversy in Docket No. R74-1 "capable of repetition, yet evading review"), citing Roe v. Wade, 410 U.S. 113, 124-25 (1973).

[4] 186 U.S.App.D.C. 331, 569 F.2d 570 (1976), *vacated as to other issues*, 434 U.S. 884 (1977).

of mail fixed delivery costs deemed to result from the maintenance of a six-day-a-week, as opposed to a three-day-a-week, mail delivery schedule.

Secondarily, we also consider certain additional claims: By first-class users contending that the approved rate structure unduly discriminates against first-class mail; and by second-class users challenging certain specific cost attributions and rate decisions.

As to the cost allocation issues that are the subject of this opinion, we affirm. The ratemaking process under the Act has reflected a constructive interaction between the Postal Service and this court that has, to a large extent, developed and sharpened the governing concepts. While certain gaps remain that will be highlighted, the efforts of the Postal Service in this ratemaking proceeding represent a reasonable response to these governing concepts.

I. Administrative Proceedings

The decision that we review was the culmination of a proceeding, known as Docket No. R77-1, carried out in accordance with the Act's complex ratemaking procedures.[5] The Postal Service initiated the process on July 13, 1977, by filing with the Postal Rate Commission (PRC) a request for a recommended decision on changes in postage rates and fees for postal services. As required by applicable regulations,[6] the request contained detailed information on the Postal Service's current financial position, its anticipated revenue needs, and its proposed cost allocation and rate schedule. The request was accompanied by the direct testimony and workpapers of 11 supporting witnesses, and numerous exhibits.

[5] 39 U.S.C. §§ 3621-28 (1976).

[6] 39 C.F.R. § 3001.54 (1978).

The request, as subsequently amended, stated that without increases in rates and fees, USPS would incur a revenue deficiency in the "test year" [7] of $2,410 million.[8] USPS proposed increases in most rates and fees to eliminate the projected deficiency. Perhaps the most notable rate proposal was one to bifurcate the rate for first-class mail—then 13 cents for the first ounce—into a 16 cent regular first-class rate and a special 13 cent citizens' rate. USPS projected that its proposed rate schedule would substantially fulfill a revenue requirement of $17,642 million.[9]

Because of a statutory deadline mandating transmittal of a recommended decision within 10 months,[10] the proceedings were conducted before the Commission en banc, without initial reference to an administrative law judge. A total of 62 intervenors and limited participants, together with an Officer of the Commission (OOC) ap-

[7] In this proceeding, USPS adopted, and the PRC approved a "hybrid test year" comprising the period March 25, 1978 to March 24, 1979. Prior regulations had defined the test period in rate proceedings to be a "fiscal year beginning not more than 12 months" subsequent to the filing of the request for a recommended decision. 39 C.F.R. § 3001.54(f)(2) (1978). The restrictiveness of this rule and the inherent lag in the PRC's decision process resulted in the likelihood that a substantial portion of the test year would elapse before the rates proposed for that period could take effect. *See* Postal Rate Commission, Docket No. R77-1, *Postal Rate and Fee Increases, 1977, Opinion and Recommended Decision*, vol. 2, App. B (May 12, 1978). [The PRC decision is in two volumes. Volume 1 consists of the PRC's opinion and recommended decision. Volume 2 contains 10 appendices. Citations to volume 1 will be to "PRC Op." Citations to volume 2 will be to the specific appendix, *e.g.*, "PRC App. B."]

[8] *See* PRC Op. at 18-19.

[9] PRC App. A at 1 (table).

[10] 39 U.S.C. § 3624(c) (1976) (as amended by Pub. L. No. 94-421, § 5(a), 90 Stat. 1306 (1976)).

pointed to represent the interests of the general public, took part. The Commission heard 75 witnesses in 62 days of hearings. The record was closed on February 22, 1978, briefs were submitted, and oral argument was heard for two days on March 28 and 29, 1978.[11]

The PRC issued its opinion and recommended decision on May 12, 1978. The decision modified slightly USPS's projected revenue requirement from $17,642 million to $17,585 million.[12] The Commission also modified USPS's proposed rates in several respects. Most significant was its rejection of the bifurcated first-class rate in favor of a single 15 cent rate.

In two separate decisions, one addressed to the citizens' rate and one to the other determinations of the PRC, the Board of Governors of the Postal Service approved the recommended decision on May 19, 1978. The rate increases took effect on May 29, 1978. Numerous parties then filed the petitions for review that are now before us.

II. Judicial Constraints

A. *Controlling Principles*

Full understanding of the specific issues raised in this case requires some discussion of the broader regulatory context: the manner in which this court has reviewed the Postal Service's efforts to develop and to apply workable principles of ratemaking under the Act. This court has stressed the congressional purpose to reduce the subjectivity inherent in the political ratemaking process that prevailed before enactment of the Act, and has required the Service to fashion methods that ensure that the rates for the various mail classes and postal services reflect as closely as possible the cost of providing these services.

[11] PRC Op. at 3.

[12] *Id.* at 21-22; PRC App. A at 1 (table).

In considering the Service's rate requests, the Postal Rate Commission faced the formidable task of developing ratemaking principles of nationwide applicability and importance on a virtually clean slate. In 39 U.S.C. § 3622 (b) (1976), Congress enumerated the factors the Commission must take into account in formulating its recommended decision. The crucial criterion has emerged out of § 3622(b)(3), which establishes

> the requirement that each class of mail or type of mail service bear the direct and indirect postal costs *attributable* to that class or type plus that portion of all other costs of the Postal Service reasonably *assignable* to such class or type.[13]

[13] 39 U.S.C. § 3622(b) (1976) provides in full:

> Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
>
> (5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

[Continued]

(Emphasis supplied). The central concern of prior ratemakings, as well as this one, has been to give content to the references to "attributable" and "assignable" costs.

In its first two rate proceedings under the Act, the Commission adopted a two-step approach to the allocation of the costs of operation of the Postal Service among the classes of mail. The Commission first "attributed" to the various mail classes and postal services only those costs demonstrably caused by providing the particular service, thereby establishing a rate floor for each class and service. The key to determining causation was a strict requirement of a showing of cost variability—that a particular cost varied with a change in volume of the service provided. Excluded from this calculus were all cost allocations that might be derived by approximation or estimation but for which causation could not be conclusively demonstrated under the variability analysis. Thus, "[t]he stricture of this approach and the unavailability of complete data led in the first two rate proceedings to recommended decisions which, by the Commission's own account, did not attribute to each class all the costs that likely were the result of providing the particular service." [14]

[13] [Continued]

> (6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
>
> (7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;
>
> (8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and
>
> (9) such other factors as the Commission deems appropriate.

[14] *NAGCP I, supra*, 186 U.S.App.D.C. at 342, 569 F.2d at 581 (footnote omitted).

In the second step, the costs remaining—after the attribution in the first step—were "assigned" to the various classes under a "value of service" or demand theory approach. Specifically, the Commission developed an "inverse elasticity rule," under which final rates were derived "by assigning to the various classes of mail different markups (above attributed costs) in inverse proportion to the relative elasticity of demand for each of the classes." [15] In this way, the Commission purported to "assign costs in a manner that fully takes into account the noncost factors of the statute." [16]

In our first consideration of the ratemaking requirements of the Act, we affirmed the decision of the Governors approving the PRC's recommended decision in the first postal ratemaking proceeding, Docket No. R71-1. *Association of American Publishers, Inc. v. Governors of USPS*, 157 U.S.App.D.C. 397, 485 F.2d 768 (1973).

[15] *Id.* at 343, 569 F.2d at 582. The court in *NAGCP I* described the concept of elasticity of demand and the value of service or demand theory approach as follows:

> [T]he demand for a product is said to be elastic if lowering its price by a specific percentage leads to a greater percentage increase in the volume sold, or if raising its price by a specific percentage leads to a greater percentage reduction in its volume.
>
> Elasticity of demand forms the cornerstone of a demand theory (or "value-of-service") approach to apportioning costs. Such an approach seeks to minimize the impact that an increase in rate will have on services with positive demand elasticities by "impos[ing] on the services in relatively inelastic demand . . . higher surcharges, over and above marginal costs, than would be imposed by *any* rule of apportionment based exclusively on cost relationships."

Id. (footnotes omitted), *quoting* J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 378 (1961) (emphasis in original).

[16] *NAGCP I, supra*, 186 U.S.App.D.C. at 343, 569 F.2d at 582 (footnote omitted).

Despite the affirmance, we took pains to express our concern over the ratemaking approach adopted by the PRC. Judge Bazelon's concurring opinion, which was joined by the other two members of the panel, noted that the Commission's attribution in that proceeding accounted for only 49 percent of the Postal Service's total costs. The remaining 51 percent was "reasonably assigned" by two USPS employees using what that opinion called a "vague formula" that consisted essentially of value-of-service considerations. *Id.* at 406-07, 485 F.2d at 777-78. The concern was that the approach permitted unstructured and essentially unreviewable discretion in the USPS staff to allocate more than half the costs of the Service. The result was emphasis on non-cost considerations, the kind that Congress had intended to excise as much as possible from postal ratemaking. The court chose not to disturb the decision, however, in view of the presumption accorded initial efforts under a novel regulatory scheme,[17] and the prospects for improved tracing of costs under PRC and USPS procedures. *Id.* at 407-08, 485 F.2d at 778-79.

The Service and the Commission failed to heed the cues of *American Publishers*. In Docket No. R74-1, the second general postal ratemaking, the Commission again applied the two step approach, "attributing" only 52.5 percent of all costs and "assigning" the remainder under the "inverse elasticity" principle. In doing so, the Commission rejected entirely the initial decision of the Administrative Law Judge. His initial decision had attributed 70.6 percent of the total costs by means of cost accounting principles that permitted allocation of costs to particular classes even where direct cost variability could not be demonstrated. It assigned the remaining costs primarily in

[17] *See* Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

accordance with cost-of-service, rather than value-of-service, principles.[18]

On judicial review, we held that this two step approach of the PRC did not comply with the requirements of the Act. *National Association of Greeting Card Publishers v. USPS* [*NAGCP I*], 186 U.S.App.D.C. 331, 569 F.2d 570 (1976), *vacated as to other issues*, 434 U.S. 884 (1977). In the language of § 3622(b)(3) and the legislative history of the Act, we discerned an obligation to apply cost-of-service ratemaking principles to the greatest extent possible. *Id.* at 346-50, 569 F.2d at 585-89. Thus, of the ratemaking criteria enumerated in § 3622(b), only § 3622(b)(3) was framed as a "requirement," emphasizing the special role played by cost

[18] *NAGCP I, supra*, 186 U.S.App.D.C. at 344-45, 569 F.2d at 583-84. The ALJ employed "distribution keys" such as weight, volume and number of pieces of mail to apportion among the classes of mail costs that were otherwise not measurably variable. For example, he reasoned that transportation costs (defined in that proceeding to include all the costs—such as salaries and vehicle costs—incurred in carrying mail from the patron's collection point to the receiving point) were governed by considerations of the weight and volume of the mail carried. Volume dictated the number and size of vehicles necessary, as well as the costs of drivers, fuel and maintenance. Weight affected the loading and unloading effort and also bore on the strength and operational expenses of the vehicles. Further, weight and volume affected the efforts of the mail carrier on his route. From these considerations, the ALJ drew an inference of causation sufficient to permit attribution of 98% of the total transportation costs. (Employing its variability approach, USPS in its presentation had attributed only 21% of transportation costs, characterizing the remainder as fixed costs subject to discretionary assignment.) Applying his method, the ALJ attributed over 70% of the total costs. He then assigned most of the remaining 30% of costs that had not been attributed to the classes in proportion to the attributed costs borne by each class, unless one of the non-cost factors of § 3622(b) dictated deviation.

considerations. The requirement that each class or type of service bear the "direct and indirect costs attributable" to it necessitated an "extended attribution" that would take into account indirect costs that were not measurably variable but that could, by employing cost allocation formulae based on accounting principles, "be determined with reasonable confidence to be the consequence of providing the service." *Id.* at 347, 569 F.2d at 586. Further, by referring to "all other *costs* reasonably assignable to such class or type," the section required that even the process of assignment was to be carried out in accordance with cost-of-service principles. Finally, we found that the proper locus for allocation on non-cost principles was to be found in the language of § 3622(b)(3), which contemplated that not all postal costs were to be attributed or assigned to a particular class or service. As to the residuum of costs, the other, "discretionary" criteria of § 3622(b) would come into play.

We found this reading of the statutory language supported by the legislative history of the Act. The central purpose of the Act was to "get politics out of the Post Office"—to eliminate the discretion to set rates that had resulted in discrimination against certain classes of mail. We noted:

> Prior to the Act the Service enjoyed broad discretion in the allocation of postal costs, a discretion which in the past had made the setting of postal rates susceptible to political bartering and the frequently abusive influence of lobbyist efforts. . . . [I]t would be anomalous to construe subsection 3622(b)(3) as permitting a grudging use of cost-of-service principles which, by expanding the residuum of costs subject to discretionary allocation, simply preserves the potential for continuing the same discriminatory treatment that the Act so clearly intended to remedy.

Id. at 350, 569 F.2d at 589. Under this standard, we found a deficiency in the Postal Service approach, which employed cost-of-service principles only where direct cost variability could be demonstrated, leaving about one half of total costs subject to discretionary allocation. We summarized the statute's requirements as follows:

> [T]he Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably be assigned to each on the basis of best available cost of service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act.

Id. (footnote omitted).

Our principal function in the previous postal rate cases lay in ascertaining the broad approaches mandated by Congress for the PRC's exercise of its ratemaking authority. Sound principle bids us accompany any further judicial review—of the specifics of these approaches and tracing methodologies—with diffidence and restraint.[19]

While cost allocations often possess a patina of scientific precision, they remain ultimately matters more of

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[19] *Compare* Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971) (reviewing court exercises restraint once it determines that there are no procedural inadequacies, the legislative mandate has not been bypassed, and the agency has engaged in reasoned decision-making).

judgment and appraisal than of mathematical certainty.[20] Recognizing the crucial play of judgment in this area, reviewing courts have traditionally deferred to agency expertise and have abstained from imposing unrealistic technical requirements or standards of precision on the administrative process. As we have pertinently summarized the matter, selection of ratemaking theories is more a question of policy than of fact: "A theory of ratemaking must be reasonable, explained, and supported, but is not subject to the same substantiation principle as the substantial evidence test applicable to fact-finding." [21] Similarly, a method of cost allocation may not be rejected simply because difficulties can be identified. Justice Brandeis long ago remarked that "experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate." [22]

In *NAGCP I*, we recognized our obligation to defer to the PRC's expert judgment in the selection of cost allocation methodologies. 186 U.S.App.D.C. at 353-54, 569 F.2d at 592-93. We noted that "to be acceptable, a methodology need only be reasoned, nonarbitrary and permissible under the statute." *Id.* at 352, 569 F.2d at 591. Our deference is particularly great where the PRC has gone beyond even the "reasonable inferences of causation" that permit "extended attribution" into the zone of "assignment." While both attribution and assignment involve inferences of causation, we observed in *NAGCP I*

[20] *See* New York v. United States, 331 U.S. 284, 328 (1947); Colorado Interstate Gas Co. v. FTC, 324 U.S. 581, 589-90 (1945).

[21] Continental Airlines, Inc. v. CAB, 179 U.S.App.D.C. 334, 342, 551 F.2d 1293, 1301 (1977).

[22] Groesbeck v. Duluth, S.S. & A. Ry., 250 U.S. 607, 614-15 (1919). *See also* Second National Natural Gas Rate Cases, 186 U.S.App.D.C. 23, 43-45, 567 F.2d 1016, 1036-38 (1977), *cert. denied*, 435 U.S. 907 (1978).

that "the latter concept permits a greater degree of estimation and connotes somewhat more judgment and discretion than the former." *Id.* at 348 n.59, 569 F.2d at 587 n.59.

B. *Marginal Cost Pricing*

Several parties to Docket No. R77-1 urged the PRC to reject the holding of *NAGCP I*.[23] The PRC properly declined the invitation. But it did lament that *NAGCP I* foreclosed its continued adherence to what it referred to as the "most talked about new development in rate regulation today"—so-called marginal cost pricing.[24] *See* PRC Op. at 75-82.

[23] Several petitioners persist in their attack on *NAGCP I* by asking this court to review the legislative history that was canvassed extensively in that opinion and to declare that *NAGCP I* was wrongly decided. If we were convinced *NAGCP I* was fatally flawed, our recourse would lie in a request for en banc consideration. We do not initiate that course.

One point does deserve comment. In 1975, prior to the argument and decision in *NAGCP I*, the House of Representatives rejected an amendment offered by Representative Schroeder that would have amended 39 U.S. § 3622(b)(3) to codify the cost allocation approach advocated by the ALJ in Docket No. R74-1; *see* note 18 *supra*. 121 CONG. REC. 30,777-84 (1975). Petitioners assert that the court in *NAGCP I* was "not informed" of this development. Brief for ANPA/NNA at 35. Quoting statements of members on the floor, they contend that this congressional action demonstrates Congress's understanding that the original Act embodied the ratemaking methodology adopted by the PRC in its first two ratemaking proceedings. Rejection of a clarifying amendment is not definitive evidence of an earlier Congress's intent in enacting a statutory provision. That is especially the case when that intent has not yet been conclusively interpreted by the courts; Congress may prefer to await a judicial interpretation. We also reject the claim of Time Inc. and the Magazine Publishers Association that the PRC somehow erred in adhering to the mandate of *NAGCP I*, thereby "substituting the court's judgment for its own judgment and methodology." Brief for Time/MPA at 38-40.

We refer to this passage, although it is not the occasion of specific protest to us, for several reasons. We are concerned that it may reflect a hostility to our opinion that has resulted in an application first grudging and then inconsistent. We are also concerned that our ruling may have been carried too far, beyond what was originally envisioned. We would not wish our rulings to result, by virtue of misapprehension, in a loss of efficiency that was not required by or implicit in the statutory mandates.

As to "marginal cost pricing," traditional economic theory, if we may sketch our general understanding, holds that in a system of "pure" or "perfect" competition the most efficient allocation of resources occurs when the price of a good or service equals its marginal cost—the cost to the economy of producing one additional unit. The marginal cost concept includes variable costs but not historic fixed costs ("sunk" costs), though it does include the cost of capital if capital investment is required to increase capacity for additional production. Traditional economic theory concludes that a price set at marginal cost achieves the optimum equalization of the current cost to society of employing scarce resources and the value to consumers of using those resources. In a system of perfect competition, an individual producer will employ his productive capacity to the degree that he can recover his variable costs, thereby minimizing average cost and maximizing attainable profit at the market price.

We do not presume to venture at large into economic theory, but it seems pertinent to observe even at this point of discussion, that the foregoing traditional theory presumes that a firm operates in an environment where market price is determined independently of the cost structure or management decisions of any individual enterprise, and where the firm tends to halt production when its marginal cost exceeds the market price.

The transfer of marginal cost pricing theory to regulated monopolies presents obvious difficulties, including

the inapplicability of the basic free-market assumptions.[24] However, it is appropriate to note that in the view of some economists, economic efficiency is similarly enhanced when the prices charged by regulated utilities are set at the long run marginal costs of the enterprise, including not only the variable cost of producing an additional unit with existing capacity, but the costs of adding additional capacity to meet increases in volume.[25] Traditional rate-making principles require, however, that total revenues generated by the regulated utility cover the historic costs of the enterprise, including a return on useful investment, as well as current operating and future capacity costs. In return for the guarantee of such a return the utility foregoes opportunities to charge the "market prices" that might be exacted from consumers. There is not a free market but a market under the constraint of what is, in effect, a long-range regulatory bargain. There is no certainty that the total revenues guaranteed by the regulatory understanding will equal the revenues that would be generated by pricing at marginal cost—which is prospective in nature even though long run marginal cost

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[24] Indeed, the application of marginal price theory presents difficulties outside the area of government rate regulation, to the extent that many suppliers in the broadly competitive areas of the economy regard their products as sufficiently differentiated so that they may act like monopolists in the sense of being unwilling to produce additional units even though marginal costs will be lowered. Their interest is in their marginal revenues, rather than their marginal costs, and they may estimate that the lowering of prices to bring out the demand for additional units will be translated into demands for equivalent lowering of prices by existing purchasers.

[25] *E.g.*, 1 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 63-86 (1970).

Our prior discussion of marginal costs in the market of perfect competition assumed not only short-range marginal costs, within the framework of existing capacity, but long-range marginal costs, with expansion of capacity.

embraces capital additions. (Of course the risk implicit in that lack of certainty is taken into account by the regulator in determining permissible rate of return.)

What economists frequently advance as the solution is the selective use of price discrimination—permitting deviation from marginal costs in inverse proportion to the elasticity of demand for the utility service of various classes of users. The concept is that this minimizes inefficient allocation of resources, because those consumers who would, relatively speaking, consume the same amount of resources regardless of price pay the greatest differential from marginal costs, while those whose level of consumption is most susceptible to price considerations are charged the price closest to marginal costs.[26]

This is the kind of thinking that apparently informed the PRC in its first two ratemaking decisions, although it did not elaborate on its view. The PRC first established an initial rate floor in the process of determining "attributed" costs by ascertaining variable (or marginal) costs. Because strictly variable costs generated only about half the revenues necessary to recover the costs of the Postal Service, the PRC then sought to "assign" the remaining unattributed costs in inverse proportion to the elasticities of demand of the various classes.

In terms of economic efficiency, the advantage of marginal cost pricing for regulated utilities is that it serves as a means of "encouraging the maximum economic use of a company's services consistent with the so-called 'full-cost' requirement." [27] A corollary is its

[26] *See id.* at 144; Huntington, *The Rapid Emergence of Marginal Cost Pricing in the Regulation of Electric Utility Rate Structures*, 55 B.U.L.REV. 689, 742-46 & n.274 (1975), and authorities cited therein.

[27] J. BONBRIGHT, *supra* note 15, at 379.

potential for close control of consumer demand, by assuring that consumption choices reflect the current costs to society of providing the resource. Marginal cost pricing has attained some currency in electric power ratemaking, where efficient utilization of increasingly scarce energy resources is a matter of primary concern.[28]

In the context of postal ratemaking, however, the dominant objective of Congress, as ascertained by the court in *NAGCP I*, was not so much the regulation of demand for postal services, as the prevention of discrimination among the mail classes. In any event, the concern for maximization of use of capacity is less compelling where demand is inelastic. The court in *NAGCP I* noted that the Postal Service had conceded that demand for all classes of mail was essentially inelastic at foreseeable rates.[29] It rejected the effort to assign almost half the costs of USPS on the basis of relative inelasticities of demand as inappropriate, as in effect permitting a discretion barred by the Act, and as unduly burdening first class mail, the most inelastic of the classes. *NAGCP I* certainly did not command a complete jettison of economic principles. It approved cost variability as an appropriate starting point for cost determinations. The path to be followed from that point on differed from that of the PRC in view of the congressional intent. This is not the only context in which a concern for equal or fair treatment yields results different from those obtainable if economic efficiency in the allocation of resources were the exclusive or even the dominant goal. The choice of

[28] Huntington, *supra* note 26, at 773-74.

[29] 186 U.S.App.D.C. at 343, 569 F.2d at 582. We do not discuss the possibility that some marginal customers may have flexibility to make other arrangements in the event of additional increases in rates charged by the Postal Service, because that factual condition was not developed in the record before the court in either *NAGCP I* or this appeal.

goals and objectives is a policy choice of the legislature, and the court's function is to ascertain the legislature's choice and to apply it, including the assurance of faithful application by agencies which make decisions subject to judicial review.

III. Service Related Costs

It is to the credit of USPS and the PRC that they have departed from their initial approach to postal ratemaking and have sought with reasonable fidelity to apply the legislative intent as delineated by this court. The task that confronted them in this ratemaking proceeding was formidable. Yet at the present juncture the primary dispute over cost allocation revolves about the allocation of only 7.14 percent of the Postal Service's total revenue requirement.[30] That is the percentage the PRC found "reasonably assignable" to certain classes of mail as "service related costs"—calculated as the fixed delivery costs incurred in maintaining a six-day-a-week, as opposed to a three-day-a-week, delivery schedule. The parties raise numerous challenges to the rationality of this assignment pattern. With the deference we accord the PRC's expert judgment in developing cost allocation methods, we find this method of allocation to be reasoned, nonarbitrary, and congruent with the legislature's objective.

Further discussion of the issue requires that we delve in some detail into the mechanics of the cost allocation process. The PRC essentially followed the approach of USPS's initial presentation, although it developed its own figures in many instances. For convenience, we shall refer in our discussion only to the PRC.

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[30] PRC Op. at 156 (table).

A. *The Domestic Mail Classification Schedule*

It is useful to start with a brief sketch of the various mail classifications as they are defined in the Domestic Mail Classification Schedule.[31] The four general classifications of mail are probably familiar to most mail users. *First-class* consists of letters and sealed parcels weighing 12 ounces or less, plus postal cards and post cards.[32] *Priority mail* is a high priority service akin to first-class for sealed parcels weighing more than 12 ounces.

Second-class and *controlled circulation* are available for magazines, newspapers and other periodicals. Second-class is divided into several subclasses and subcategories. Second-class regular rate is the one that encompasses the vast majority of second-class mailings. Second-class is essentially for bulk, not single piece, mailing.

Third-class is a service for single pieces and bulk mail, consisting of matter that is not mailed or required to be mailed as first-class, is not entered as second-class or controlled circulation, or weighs too little to qualify as fourth-class. Single piece service is used by individuals for small parcels and by organizations for minor distribution of parcels, catalogs and other printed matter. Bulk mail service is used by businesses, institutions or government agencies to send brochures, catalogs, samples or other matter in mailings of 200 pieces or more or with a total weight of 50 pounds or more.

Fourth-class includes parcel post (merchandise weighing 16 ounces or more); bound advertising matter; books, films, sound recordings and other matter entitled to a "special rate;" and library rate mail.

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[31] *See generally* Postal Rate Commission, Docket No. MC73-1, *Mail Classification Schedule 1973, Opinion and Recommended Decision* (April 15, 1976), approved by Governors of USPS (June 2, 1976).

[32] "Postal cards" are printed by the government, while "post cards" are printed privately. *See* PRC Op. at 178.

USPS also offers Express Mail (an expedited delivery service to and from some cities) and many other special services, such as certification, registration and C.O.D.

B. *Attribution of Variable Costs*

As its first step, the PRC determined USPS's revenue requirement by projecting its costs for each of 20 "cost segments" [33] based on estimates of the volume of mail that would be generated at the proposed rates.[34] The PRC determined the revenue requirement to be $17,585 million,[35] modifying USPS's calculation slightly.

Within each cost segment, the PRC then determined the percentage of costs that could be said to vary with volume—over either the short or long run. This percentage was then available for attribution to the various classes by application of an appropriate "distribution key." In the PRC's opinion, cost variability with volume remained the key to attribution. It stated that it could not have "reasonable confidence" that costs were in fact the "consequence of providing the service" unless

> there is at least some showing of volume variability over the long run. If costs do not vary with volume over either the short or long run, there is still the possibility of cost assignment under [*NAGCP I*], but we see no basis for attribution, if we are to maintain any distinction between attribution and assignment.[36]

[33] Examples of "cost segments" include Postmasters (Segment I), City Delivery Carriers, In-office work (Segment VI), City Delivery Carriers, Out-of-office work (Segment VII), Motor Vehicle Service (Segment XII), Building Occupancy (Segment XV) and Administration and Regional Expense (Segment XVIII). PRC App. A at 1.

[34] *See* PRC App. H (mail volume projections).

[35] *See* pages 12-13 *supra*.

[36] PRC Op. at 84.

In view of USPS's improved data on long run variable costs, the Commission found *NAGCP I*'s requirement of "extended attribution" satisfied. The PRC called for further improvements in data to lessen the need for reliance on "mere inferences of causation." [37]

The PRC apparently takes the position that "mere inferences of causation" beyond volume variability are not an appropriate basis for attribution.[38] This is not entirely congruent with that part of the language of the *NAGCP I* opinion that prescribed *attribution* of costs "through variability theory as well as through other reasonable inferences of causation." [39] Since no party has challenged the PRC decision on this point, we do not pass

[37] *Id.* at 85.

[38] The PRC apparently continues to resist the application of the kind of cost accounting advocated by the ALJ in his initial decision in Docket No. R74-1 and commended by the court in *NAGCP I*. *See* note 18 *supra*. For example, the Commission rejected an assignment of fixed delivery costs proposed by the Officer of the Commission, the only party other than USPS to present a full costing case. OOC witness Robertson contended that *all* fixed delivery costs could be considered capacity costs reasonably assignable to the classes of mail on a "relative use" basis. Applying a distribution key composed of a combination of pieces and cubic feet, Robertson was able to assign to the various classes $3.1 billion, compared to the $1.4 billion found assignable by USPS in its presentation and the $1.256 billion ultimately assigned by the PRC. The PRC rejected Robertson's approach. Under that approach, it stated, "all postal costs could be assigned to the classes of service for which the physical functions are performed, leaving little, if any, in the way of residual costs and no room for the application of the noncost ratemaking factors listed in § 3622(b) and referred to by the court in the *NAGCP I* decision." PRC Op. at 103.

[39] *NAGCP I, supra*, 186 U.S.App.D.C. at 350, 569 F.2d at 589.

on it.[40] We do observe, however, that the PRC was struggling with the *NAGCP I* court's rather murky distinction between "attribution" (for reasons other than volume variability) and "assignment," both of which were to proceed from "inferences of causation."[41] Taking into account the PRC's expansion of the scope of attributable costs based on variability, its relegation of costs derived from inferences of causation to the assignable category alone may well have been an appropriate application of *NAGCP I*. The context is one in which USPS's enhanced ability to attribute costs on the basis of volume variability resulted in the attribution, after PRC modification, of almost 65 percent of total costs.[42]

C. *Assignment of Service Related Costs*

The PRC's assignment of service related costs proceeded from differences in service accorded the various classes of mail. The Postal Service Manual commits the Service to different standards of service for different types of mail, based on USPS's perception of customer needs, and transportation and distribution capabilities.[43] For

[40] Petitioners American Newspaper Publishers Association and National Newspaper Association do contend that the PRC misconstrued *NAGCP I* by assigning service related costs, *see* pages 31-35 *infra*. The gravamen of their complaint is that the PRC was too rigorous, rather than insufficiently rigorous, in its application of cost-of-service principles. They state: "if *NAGCP I* meant what the Commission believed, it would be contrary to the statute." Brief for ANPA/NNA at 35. Although framed as a challenge to the PRC's construction of pertinent precedent, this argument is little more than a disguised request to this court to reconsider *NAGCP I*, and has been rejected. *See* note 23 *supra*.

[41] *See* pages 21-22 *supra*.

[42] PRC Op. at 156 (table).

[43] R. 4-01357.

first-class mail and for newspapers (a "service category" within the second-class regular rate classification, also known as "red tag" mail [44]), the Manual requires delivery on "the first delivery trip" if the mail is received at a "distribution facility" prior to the cut-off time.[45] For third- and fourth-class parcels, USPS is required to deliver on the next delivery trip all parcels received prior to the cutoff,[46] but the post offices have more flexibility in determining that cutoff. For all other mail, including third-class mail and second-class publications not entitled to red tag service, the regulations provide for "delivery not later than the second day after receipt." [47]

Two witnesses provided the main evidence before the Commission. Postal Service witness Jellison, the Assistant Postmaster General for Mail Processing, testified on the differences in service standards. Jellison first ranked the priorities of treatment given the various classes of mail, in order of decreasing significance: (1) first-class mail, including priority mail and post or postal cards; (2) newspapers or red tag mail; (3) parcels (both third- and fourth-class); (4) ordinary papers (all second-class not entitled to red tag service and controlled circulation); and (5) circulars (fourth-class bound printed matter and all third-class except single piece parcels). Jellison then

[44] In order to be eligible for newspaper treatment, publications must be published weekly or more frequently and feature news of general public interest. Postal Service Manual § 125.41. Limitation of eligibility for this service is a subject of current controversy. *See* pages 43-45 *infra*.

Probing from the bench at oral argument elicited that the "red tag" appellation derives from the fact that a pink slip of paper, signalling entitlement to special service, is inserted into the hasp of a mail bag. Tr. of Oral Argument at 58-59.

[45] Postal Service Manual § 352.211.

[46] *Id.* § 352.213.

[47] *Id.* § 352.212.

characterized first-class and newspapers as "preferential" because of the requirement of immediate delivery upon receipt at the distribution facility; parcels as "borderline" preferential; and the other classes as "nonpreferential" or "deferrable" because of the ability to defer delivery of that mail for one day after it reached the distribution facility. The witness differentiated the levels of service afforded preferential and nonpreferential mail at each stage of the mail process between receipt and delivery. He asserted that while preferential and nonpreferential mail were often delivered together, deferrability of some classes permitted workload levelling, and avoidance of the need for overtime or part-time employees, at peak periods, with resultant efficiencies. Jellison concluded that because of the deferrability feature, nonpreferential service standards could be met by delivery every other day, as opposed to the current six-day delivery schedule. In his view, were it not for the existence of preferential mail, a three-day delivery system with recipients receiving mail every other work day would be feasible.[48]

Based on Jellison's conclusion as to the feasibility of a three-day delivery schedule, USPS witness Hume, a private consultant, sought to calculate the costs resulting from the need to maintain six-day delivery to meet preferential service standards.[49] Although transportation and processing costs would likely be affected by initiation of a three-day schedule, Hume focused only on the delivery function. He found that in the other two functions, service related costs either were volume variable (and therefore would be accounted for in the attribution step), or could not be determined with sufficient accuracy from available data.[50]

[48] PRC Op. at 94-97; R. 4-01352-80.

[49] PRC Op. at 97-99; PRC App. J at 239-66; R. 4-01423-52.

[50] PRC Op. at 99-101.

Hume estimated the delivery costs that would be incurred in a three-day delivery system, assuming no variations in total mail volume. By subtracting this figure from the projected delivery costs in the six-day delivery system, he obtained the delivery costs occasioned by maintenance of a six-day schedule. Because variable costs would be attributed under either schedule, he then determined the proportion of delivery costs that would be fixed under each system. The difference in fixed costs he assigned as service related costs to the classes receiving preferential service.

The PRC approved the methodology proposed by the USPS witnesses. It found that nonpreferential mail is deferrable under the Postal Service's standards and that, in fact, such mail is frequently deferred.[51] It agreed with the Postal Service that "it can reasonably be inferred that the preferred classes cause the differential between 3-day and 6-day delivery costs."[52] Adjusting somewhat USPS's calculations, the PRC made an "assignment" of $1,256 million in test year costs, or 7.14 percent of the total revenue requirement.[53]

While asserting that, as a first effort, the use of service-related costs was satisfactory, the Commission urged further refinement in three areas: (1) the analysis used in determining the cost differentials resulting from service priorities at the delivery stage; (2) the development of data and methodology to reflect more accurately the actual hierarchy of delivery standards in the assignment of service related costs; and (3) more complete investigation

[51] *Id.* at 102.

[52] PRC App. J at 247.

[53] PRC Op. at 156 (table). Of this sum, $881 million was assigned to first-class, and $67 million to second-class regular rate. The PRC also assigned an additional $507 million, the amount represented by the contingency reserve. *Id.* at 91-93, 156 (table).

into the possibility of extending service related costs to functions other than delivery.[54]

D. *Objections to Assignment of Service Related Costs*

In considering the various challenges to the assignment of service related costs, we recall that we judge a particular ratemaking methodology by whether it is reasoned, nonarbitrary and congruent with the statutory mandate. We do not insist on mathematical precision in developing new ratemaking methods; mere articulation of imperfections in a new scheme will not alone defeat it. This is especially true in cost *assignment*, where, as *NAGCP I* recognized, there is a wide scope for the exercise of judgment and discretion by the PRC. With this overview, we conclude that the service related cost method reflects a reasonable inference of causation and, despite the imperfections identified by the parties, represents an acceptable first effort at meeting the strictures of *NAGCP I*. Our conclusion is supported by PRC's avowed intention to require refinement of the service related cost method in future rate procedings.

The newspaper publishers[55] attack the assignment of service related costs as arbitrary and unreasonable on the ground that nonpreferential mail is rarely, if ever, deferred in the delivery function. According to these parties, the current delivery system is designed to ensure that each carrier can deliver each piece of mail he receives at the delivery unit each working day. To further this design, the Postal Service conducts an annual review of its routes and adjusts them to guarantee delivery of all mail that comes into the delivery unit.[56] On heavy volume

[54] PRC Op. at 123-24.

[55] Petitioners American Newspaper Publishers Association and National Newspaper Association.

[56] USPS Methods Handbook, Series M-39, *Management of Delivery Services* § 210-243.

days, delivery service managers may use overtime or auxiliary help, but deferral is discouraged.[57] Instead, it is argued, most deferral occurs not at the delivery stage, but in mail processing units before reaching the delivery unit.[58] Based on these facts, the publishers submit that "it is arbitrary and unreasonable to apportion costs upon the basis of a theoretical differential between preferential and nonpreferential mail in the delivery function."[59]

The publishers do not dispute that deferral can and does occur relatively frequently at some point in the mail handling process. The deferrability gives rise to differences between preferential and nonpreferential mail in the overall level of service provided. Accordingly, it was not unreasonable for the PRC to infer that the preferential classes may be called upon to bear the cost of providing the capacity—*i.e.*, six-day delivery—necessary for this preferential service. The PRC reasoned that if all mail were nonpreferential, then three-day delivery would be feasible, and that the additional fixed costs resulting from maintenance of the six-day schedule could be determined. The primary source of such costs was found in the delivery unit, but the PRC recognized that, with improved data, such costs could be determined for other functions as well. In drawing this inference of causation, the salient feature was overall level of service, not whether, under current practice, the deferral that does take place occurred within any particular function.

Recognition that overall service levels, and not deferrability within one function, provide the key to service related costs also forms the basis for distinguishing the PRC's rejection of the citizens' rate. As explained by Judge Tamm in the companion opinion, that special rate

[57] *Id.* § 121.2.

[58] R. 3-06807, 3-00936, 4-01460-61.

[59] Brief of ANPA/NNA at 19-20.

was premised on deferrability in the delivery function *only*.[60] The PRC concluded that because such deferral was unlikely to occur in practice, there would be no difference in overall service that would justify an unequal allocation of delivery costs as between citizens' rate and regular first-class mail. On the other hand, in the case of preferential versus nonpreferential mail, there are conceded differences in overall service that do justify disparate cost assignments.

The newspaper publishers, joined by the first-class mail users,[61] make a further argument. For this purpose they assume, in effect, the reasonableness of the PRC model in determining costs that are caused by the need to maintain a six-day delivery schedule. Although the non-preferential classes may not require six-day delivery, in practice they are often delivered without deferral, and so receive the benefit of six-day delivery capacity. By assigning "capacity" costs entirely to the preferential classes, they argue, the PRC gives the nonpreferential classes a "free ride." These parties contend that such a "free ride" is contrary to legal precedent and sound economics. They point to *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945), as prohibiting such a "free ride" by theoretically "interruptible" customers who get the benefit of capacity provided to serve peakload customers. While *Colorado Interstate* does lean against free riders, it does not establish a legal prohibition against assigning all capacity costs to peakload customers. That case rather affirmed the FPC's discretion to require interruptible customers to bear some portion of capacity costs.

In general we agree with the first-class users that there is good reason, in economics and common sense, to call upon nonpreferential classes to contribute to the capacity

[60] *See* pages 68-71 *infra*.

[61] Various petitioner and intervenor States.

costs used in providing them a benefit.[62] However, as applied to the costs entailed in maintaining a six-day system, the question is not a simple one. There is a question whether and to what extent the users of this nonpreferential mail receive a benefit of value. On the record, we cannot hold that the PRC abused its discretion in choosing as of this ratemaking proceeding not to require the nonpreferential classes to contribute to the differential in capacity costs ascribable to a six-day system.

Various parties attack the PRC for failing to justify fully the operational feasibility of its hypothetical three-day delivery schedule. They also assert that the PRC erred in assuming that all other aspects of postal operations would remain relatively constant under a three-day system and in failing to consider the effects on costs of distortions in the postal system that would result from three-day delivery. The PRC did provide a discussion of the feasibility of the three-day system.[63] While some of

[62] *E.g.*, 1 A. KAHN, *supra* note 25, at 78.

[63] The PRC hypothesized a three-day system in which half the routes would be delivered Monday, Wednesday and Friday, and the other half would be delivered Tuesday, Thursday and Saturday. Even though each route would be delivered only three days a week, the postal system as a whole would continue to function six days a week. Based on this model, the PRC first concluded that current mail volume could be handled at the delivery unit without causing buildup prior to delivery. The PRC assumed a volume of 2,400 units a week on a set of four mail routes, and that 100 units were currently delivered per route on each of six days. Under the three-day system, the amount delivered on each route would double to 200 units a day, but the amount handled at the delivery unit would remain 400 units per day. PRC App. J at 242-43. The PRC then considered the feasibility of three-day delivery in terms of effect on the current eight-hour work schedule necessary to deliver a given route. Taking into account the additional time necessary to service a route with doubled volume, the PRC found that it would take 11.4 hours to service a route under a three-day system, as compared to eight hours assumed under

its assumptions are, to put it mildly, optimistic, we cannot say that the system is so unrealistic a model as to call into question the rationality of the conception underlying service related costs. A model may be useful for purposes of analysis, though it premises a condition that has not been and indeed cannot be exactly duplicated in real life. A familiar instance is the model of Newton's laws of motion with its (unrealistic) premise of a world without friction.

More substantial is the contention that the Postal Service had an obligation to consider the effect of a three-day system on other functions of the postal system. However, the PRC did not reject the need to make its model as realistic as feasible. Instead, it found as a fact that the other functions of the Postal Service would remain relatively stable, without significant distortion from the institution of a three-day system.[64] That conclusion finds support in the record.[65] It must be remembered that we

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the six-day schedule. The net result was a projected weekly savings of 13.8 hours or 29 percent in the time necessary to service any given route (48 hours per week under the six-day schedule minus 34.2 hours per week under the three-day schedule). To the potential difficulty that no one carrier would or could perform in one day the 11.4 hours necessary to complete the route, the PRC responded:

> On any route's delivery day, a carrier would require 3.4 hours of in-office time and assistance to satisfy an eight-hour day. Since other carriers would not be delivering on his delivery day, the delivering carrier could draw upon one of those other carriers, on his delivery day, and he could assist another carrier on his non-delivery day.

PRC App. J at 244. Presuming this sharing of workload and perhaps some adjustment of routes, one cannot say the PRC model was so unrealistic as to be irrational.

[64] PRC Op. at 113-18.

[65] R. 4-01893-912 (testimony of Postal Service Witness Lynn).

deal here with inferences of causation. The PRC may draw reasonable inferences of causation without resolving all subsidiary issues, especially those that would require extensive and disproportionate effort.

The magazine publishers [66] challenge the reasonableness of the service related cost concept on the ground that the service standards on which it was based do not reflect any determination as to which classes actually "need" six-day delivery and which can therefore be said to "cause" the six-day delivery schedule. They argue that the existing service standards were adopted as the basis for service related costs without investigation into whether the classes receiving preferential service under the standards actually required that preference. Specifically, the magazine publishers contend that magazines require delivery only two days a week; hence, magazines, at least, cannot be said to "cause" six-day delivery.

The issue raised by this contention is substantial, but in the last analysis it does not warrant rejection of the PRC's methodology. While the mail system is bounded by constraints against undue preferences or discrimination, it need not be, and probably could not be, tailored to match perfectly individual customers' perceptions of their own service needs. In mail classification, judgments are properly made that similarities between types of mail or mail users justify their inclusion within a single class, even where there might be differences among them in the service desired. Thus, daily newspapers, which presumably demand prompt delivery, are included in second-class with magazines of various publication frequencies.[67] Their similarities are evident, especially in the context of their joint entitlement to a congressionally mandated preference based on their key characteristics of regularity

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[66] Time Inc. and Magazine Publishers Association.

[67] Domestic Mail Classification Schedule § 200.1(a).

of publication and type of information conveyed.[68] The Postal Service must be afforded broad discretion to manage its operations efficiently by developing service priorities. In making these decisions, USPS need not restrict itself only to considerations of customer need, but may also take into account such operational factors as transportation availability and distribution capabilities. So long as these service priorities are not manifestly unrealistic, USPS is not obliged to undertake a comprehensive review of its service priorities before those priorities may form the basis of cost allocations. In this case, it was not manifestly unrealistic for USPS to conclude that magazines published weekly or more often (and therefore entitled to "red tag" service) would, like daily newspapers, require the prompt delivery accorded by a six-day schedule.

In a similar vein, the magazine publishers and mailers of third- and fourth-class parcels[69] contend that it was arbitrary to assign costs on an all-or-nothing basis depending on whether a class was designated preferential or nonpreferential, when the service priorities as described by witness Jellison form not a simple dichotomy but rather a hierarchial array—with first-class taking precedence over all other classes. The result, these parties contend, is discrimination—the assignment of equal cost responsibility for unequal degrees of service. While there is some merit to this objection, we do not find it fatal in the context of this ratemaking proceeding. USPS and the PRC, in developing the service related cost method, endeavored to meet this court's mandate in *NAGCP I*. In the initial implementation of a new ratemaking approach, some leeway for approximation and estimation must remain. The courts often uphold regulatory actions on

[68] *See* 39 U.S.C. §§ 3622(b)(8), 3626 (1976).

[69] The Association of American Publishers and Recording Industry Association of America.

the premise that the approximations will be subject to refinement.[70] The rough categorization of service priorities into preferential and nonpreferential was a reasonable first approximation in tracing the costs of providing the various levels of service. That this dichotomy may not suffice in future proceedings is highlighted by the PRC's exhortation to USPS to develop data and methodologies that will reflect more accurately the hierarchy of service priorities. We prefer to leave such efforts at refinement of methodologies in the hands of the PRC.

This approach also serves to dispose of the parcel mailers' further claim of error in the PRC's failure to determine actual operating priorities before assigning costs on the basis of "hypothetical" service priorities. Such a study, they believe, would prove that "borderline" classes—*i.e.*, parcels—are actually afforded nonpreferential treatment. We do not find it unreasonable to draw inferences of causation without detailed studies of actual operating practices, at least in the context of an initial effort. We again note the PRC's request that USPS provide more accurate data on service priorities in future proceedings.

Finally, we do find substance to the claim of American Business Press, Inc. (ABP), an association of publishers of specialized business publications. Despite the fact that preferential or "red tag" second-class mail makes up only 40 percent of all second-class mail, the PRC assigned to all second-class, both preferential and nonpreferential, the service related costs caused by providing preferential service to red tag. We agree with ABP that assignment

[70] *E.g.*, Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968); Second National Natural Gas Rate Cases, 186 U.S. App.D.C. 23, 70-71, 567 F.2d 1016, 1063-64 (1977), *cert. denied*, 435 U.S. 907 (1978); *see* Atchison, T. & S.F. Ry. v. ICC [Market Dominance], 188 U.S.App.D.C. 360, 377, 580 F.2d 623, 640 (1978).

of service related costs to mail not receiving preferential service raises serious concerns of discrimination.[71] In our preceding discussion, we have accepted, at least for this case, the PRC's adoption of a model based on a dichotomy between preferential and nonpreferential mail, even though that distinction may not entirely reflect actual service priorities. But the failure to distinguish in the assignment of costs between preferential and nonpreferential mail goes contrary to the PRC's own model.

Despite our concern, we decline to disturb the PRC's decision at this time. There is some doubt whether the issue was fully ventilated in the proceedings before the PRC.[72] In any event, the Commission has chosen to deal with the issue as a classification matter, rather than in the context of a ratemaking proceeding. In Docket No. MC76-2, the Commission recently rejected a proposed surcharge on red tag mail, as well as a proposal to eliminate the current restriction on the availability of red tag

[71] *See* Trailways of New England, Inc. v. CAB, 412 F.2d 926, 933 (1st Cir. 1969); Payne v. Washington Metropolitan Area Transit Comm'n, 134 U.S.App.D.C. 321, 335-36 n.71, 415 F.2d 901, 915-16 n.71 (1968).

[72] The thrust of ABP's presentation to the Commission was not that assigning service related costs to ordinary second-class regular rate was discriminatory *per se*, but that such an assignment would be inconsistent with the Postal Service's citizens' rate proposal, which premised rate distinctions on differences in service related costs within a class. Counsel for ABP stated that if a citizens' rate were rejected, then "a separate rate for deferred nonpreferential periodical mail would not be warranted." R. 2-02927. *See* Rhode Island Consumers Council v. FPC, 164 U.S.App.D.C. 134, 143-44, 504 F.2d 203, 212-13 (1974) ("The agency cannot reasonably be expected to take a hard look unless the parties participate in the task of identifying the hard problems, and of bringing to light pertinent information and analysis bearing on their resolution.").

to periodicals with a frequency of once a week or more.[73] The Board of Governors affirmed this aspect of the Commission's recommended decision, but rejected a recommendation that red tag be incorporated into the Domestic Mail Classification Schedule as a separate subclass of second-class.[74] Both decisions indicated that a reexamination of the question would be appropriate in light of the adoption—subsequent to the development of the record in that proceeding—of the service related cost methodology.[75] The PRC has recently initiated a proceeding, Docket No. MC79-3, to undertake that reexamination.[76] Although, as this discussion reveals, mail classification and postal rate issues are often intertwined, the Act establishes separate, though parallel, procedures for considering each of them.[77] While it is feasible, and perhaps desirable, to consolidate the consideration of classification and rate issues where appropriate,[78] the PRC did not act

[73] *Opinion and Recommended Decision After Exceptions to Tentative Decision Denying Proposal by the Officer of the Commission to Expand the Availability of Red Tag Service and Institute a Surcharge for Expedited Service* (June 16, 1978).

[74] *Decisions of the Governors of the United States Postal Service re Several Recommended Decisions of the Postal Rate Commission on Proposed Changes in the Domestic Mail Classification Schedule* (Sept. 7, 1978). Judicial review of this decision is currently pending. Pennington v. USPS, No. 78-1899 (D.C.Cir., appeal docketed Sept. 12, 1978).

[75] *Governors Decision, supra* note 72, at 7; *PRC Recommended Decision, supra* note 71, at 21.

[76] Letter from USPS Counsel (Jan. 9, 1979).

[77] *Compare* 39 U.S.C. § 3622 (1976) (postal rates and fees) *with* 39 U.S.C. § 3623 (1976) (mail classifications).

[78] In this proceeding, the Postal Service's citizens' rate proposal was treated as a classification matter as well as a rate question. USPS followed the requirements of 39 U.S.C. § 3623 (1976) and its implementing regulations, 39 C.F.R. § 3001.61-.66 (1978). *See* PRC Op. at 1-2.

arbitrarily in choosing to explore this matter in the context of classification proceedings. We therefore defer to the PRC's pending proceeding where the issue will receive further analysis, with this court's concern in mind.[79]

IV. First-Class Users' Claims

A. *Undue Discrimination Against First-Class Mail*

Several petitioner and intervenor states, large users of first-class mail, mount a generalized attack on both the rate schedule adopted by the Board of Governors in approving the PRC decision, and the cost allocations underlying that rate schedule. The cornerstone of their position is a comparison of the rates charged for allegedly similar pieces of first- and second-class mail receiving identical service. Thus, the rate for mailing a piece of presorted first-class mail weighing four ounces would be 52 cents, while the rate for a piece of second-class red tag mail weighing four ounces would be 10.8 cents or less, depending on the degree of presortation.[80] The States

[79] *Cf.* Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967) (ripeness doctrine). A further consideration influencing us to stay our hand at this time as to a relatively minor point, is uncertainty about our power to remand only a portion of the decisions under review. The section of the Act providing for judicial review, 39 U.S.C. § 3628 (1976), also declares: "The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision." For other instances of affirmance of a large proceeding notwithstanding doubts about relatively minor points, see Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Trans World Airlines, Inc. v. CAB, 128 U.S.App.D.C. 126, 385 F.2d 648 (1967), *cert. denied*, 390 U.S. 944 (1968).

[80] The second-class regular-rate is a combination of three charges: (1) a three tier per-piece charge varying according to degree of presortation; (2) a flat per pound rate for the editorial, nonadvertising portion of the publication; (3) a per pound rate for the advertising portion varying according to the distance (measured in "zones") from the mailing office. *See* PRC Op., App. 1 at 7. The States' hypothetically presumed a four ounce piece of second class regular rate mail containing half advertising and half editorial matter, mailed to a point within either zone 1 or 2 (the zones nearest the post office).

point to portions of Postal Service witness Jellison's testimony supposedly proving that first-class and red tag receive identical service.[81]

The States claim that this disparity demonstrates discrimination *per se*, since unequal rates are being charged for identical services.[82] They also infer that first-class users are subsidizing the costs of providing second-class service. Adjusting for differences in "cost coverage"[83]

[81] In actual practice, second class red tag mail is processed, transported and delivered concurrent with first class mail the majority of the time.

R. 3-00919.

[82] *See* Payne v. Washington Metropolitan Area Transit Comm., 134 U.S.App.D.C. 321, 335-36 n.71, 415 F.2d 901, 915-16 n.71 (1968).

[83] "Cost coverage" is the percentage of the costs of providing a class of mail service that the rates for that class generate. It is an index of the allocation of costs remaining after attribution and assignment under the residual criteria established by 39 U.S.C. § 3622(b). Because mail classes are required, with a few minor exceptions, 39 U.S.C. § 3626(a), to meet the attributable and assignable costs to them, 39 U.S.C. § 3622(b)(3), cost coverage will exceed 100 percent. In Docket No. R77-1, the PRC allocated the residual costs in such a way as to give first-class a cost coverage of 124 percent, and second-class regular rate a cost coverage of 100 percent. *See* PRC App. G, schedule 2. To reach its rough figure of a 40 cent actual cost of mailing a four ounce first-class piece, the states compared the 124 percent cost coverage figure for first-class to the 100 percent that represents attributable and assignable costs, and concluded that 80 percent of a given first-class rate could be said to reflect the actual costs of providing that service. Eighty percent of the 52 cent rate for a four ounce piece equals approximately 40 cents. *See* Brief for Petitioner and Intervenor States at 24-25.

between first- and second-class rates, the States surmise that the actual cost—under the PRC's cost calculation—of mailing the four ounce first-class piece is approximately 40 cents and the cost of the comparable second-class red tag service is 10 cents. To the states, "simple common sense" suggests that, since both classes receive identical service, the rate for second-class red tag service cannot be covering the true cost of providing that service.

This argument does not undercut the reasonableness of the rate schedule. In the first place, it is not at all clear from the record that the service accorded red tag mail is identical to that given first-class. Jellison's testimony was that while second-class red tag mail is processed, transported and delivered concurrently with first-class mail the majority of the time, red tag was deferred as against first-class in heavy volume periods.[84] This deferrability undercuts any easy conclusion that the services are identical, even though its cost consequences are unclear, since relative deferrability within the preferential category did not enter into the PRC's model for assigning service related costs.[85] Further, in handling first-class mail, USPS must perform a number of functions—such as pickup at a multitude of locations (mailboxes, office buildings)—that are not required for handling second-class, which must be delivered presorted to the post office. It is accordingly likely that the cost of handling second-class is lower than the cost of handling first-class mail.

A more fundamental difficulty is that the States' charge of a gross disparity in the rates charged first-class and second-class pieces of identical weight presumes that cost responsibility is a function only of weight, and that weight alone is the proper basis for comparison. Yet, depending on the particular cost segment, cost responsibility may result from any one or a combination of a number of factors, including not only weight but such factors as cubic volume and number of pieces mailed. The PRC employs these factors as "distribution keys" to distribute the costs of any one segment among the classes based on an inference as to causation of the costs of providing that segment of service to that particular class.

[84] R. 3-00919.

[85] *See* pages 32-35 *supra*.

It may be enlightening to compare the rates charged the average pieces of first-class mail and second-class red tag mail. The average weight of all first-class letters and sealed parcels is 0.5 ounce;[86] the rate for this average piece would be 15 cents. The average weight of second-class regular rate publications is six ounces,[87] and using a piece comparable to that hypothesized by the states,[88] would be charged a rate of approximately 13.1 cents or less. After adjustment for cost coverage similar to that made by the States in their comparison, the cost to mail a first-class letter is 12 cents, to mail the second-class piece 13.1 cents. When comparison is made on a per piece basis, the claims of discrimination and subsidization lose their force. The point is not that this comparison proves absence of discrimination, but that reliance on any one key as the only test is inadequate.

We are sensitive to the first-class users' concern that the historical discrimination against first-class mail—a concern that permeated the passage of the Act and the decision in *NAGCP I*[89]—may persist. We do not ad-

[86] R. 4-00539 (table).

[87] R. 4-00540.

[88] *See* note 80 *supra*.

[89] *See* Lewis Publishing Co. v. Morgan, 229 U.S. 228 (1913); *NAGCP I, supra*, 186 U.S.App.D.C. at 348-50, 569 F.2d at 587-89; S. REP. No. 912, 91st Cong., 2d Sess. 11 (1970); 116 CONG.REC. 21,712 (1970) (remarks of Sen. McGee).

vance these defects in the States' model as demonstrating decisively that first-class is not the subject of discrimination and does not subsidize other classes. But they do expose in high relief the States' failure to relate their claims to the extensive cost data relied upon by USPS and the PRC. Artificial comparisons cannot substitute for a showing that the PRC's specific cost allocations were not supported by substantial evidence.

B. *Use of "Value of Service" Criteria*

The States make an additional argument that the PRC relied upon "value of service" criteria to an impermissible extent, in contravention of the command of *NAGCP I*. Under a "value of service" approach costs are allocated not by tracing of cost causality, but by judgments as to the value of the service to the user or "what the traffic will bear."

We find the States' complaint hard to comprehend. It is directed at the testimony of Postal Service witnesses Sobin and McCaffrey. Sobin testified about projections of mail volume in the test year and estimates of "price parameters," or elasticities of demand, for the various classes of mail and mail services. These latter estimates of elasticity both entered into the projections of volumes in the test year before rate changes, and provided a basis for estimating the reduction in volume that would result from the increased rates recommended by the rate design witness.[90] That witness was McCaffrey, who determined the appropriate cost coverages for the various mail classes and subclasses, applying the rate criteria of 39 U.S.C. § 3622(b). According to McCaffrey, "Based on my proposed rates, witnesses Sobin and Kluttz [the Postal Service's revenue requirement witness] computed after-rates volumes and revenues." [91]

[90] R. 4-00556.

[91] R. 4-01567.

In determining the appropriate cost coverages, which measure the allocation of residual costs after attribution and assignment, McCaffrey applied the discretionary criteria of § 3622(b), including "the value of the mail service actually provided each class or type of mail service to both the sender and the recipient." 39 U.S.C. § 3622(b)(2) (1976). We do not understand the States to challenge the use of "value of service" in the allocation of residual costs to the various classes. Rather, they seem to challenge the reliance, in the initial determination USPS' costs, on projections of the volumes that will be mailed at the proposed increased rates, because these volume projections are derived by applying estimated elasticities of demand to the projected test year volumes at the rates prevailing before the increases. Since any estimate of demand elasticity will incorporate judgments as to the value to the consumer of obtaining the service, reliance on these estimates permits "value of service" to creep somehow into the process of cost attribution and assignment.

Giving the States' argument the most generous cast, we nonetheless find it without merit.

Contrary to the States' suggestion, it is not at all clear that volume projections based on demand elasticity enter into the process of cost attribution and assignment. Conceptually, attribution and assignment are functions discrete from determination of the revenue requirement or designation of the appropriate rate schedule. By definition, attributable and assignable costs vary, at least by inference, with volume. Unless there is an assumption of significant economies of scale, not here posited, the process of attribution and assignment of costs is not materially affected by total volume projection; whatever the volume, a rate will recover attributable and assignable costs. Total volume projections enter the calculation because it is necessary to design the rate schedule to recover not only "variable" (attributed and assigned)

costs but also "institutional" (residual) costs. It can only be determined whether a given rate schedule will recover all institutional costs when there is an accurate projection of the volume that will be generated under that schedule. Demand elasticity is pertinent only in the stage of designing rates to recover residual costs, and that is precisely the area where the statute permits "value of service" to be considered.

Even if, for purposes of discussion, one were to accept the States' supposition that demand elasticity enters into cost attribution and assignment, such an effect would be incidental to analysis based on volume estimates. Volume estimates are vital to sound ratemaking. It is difficult to envision a ratemaking scheme that does not require estimates of volume, and it would be absurd to preclude the use of volume projections because their ascertainment requires some consideration of the relative value to consumers of the services.

Nothing in *NAGCP I* requires such a result. The court condemned the overt use of "value of service criteria," *i.e.*, assigning almost half of the costs of the Postal Service on the basis of the relative inelasticities of demand of the mail classes.[92] The court commended the use of cost-of-service principles. But whether the costs so ascertained, and rates based thereon, will suffice to cover revenue needs naturally requires volume projections, even though these involve some ascertainments of demand elasticity. This is inherent in any rational scheme of cost allocation.

V. Second-Class Users Claims

Having been concerned to this point with the broad sweep of the PRC's performance under the Act, we now

[92] *NAGCP I, supra*, 186 U.S.App.D.C. at 343-44, 569 F.2d at 583-84; pages 17-19 *supra*.

consider the lacunae of three specific decisions concerning second-class mail.

A. *Limitation of Presort Discount*

As noted above, *supra* note 80, the second-class regular rate (for mailings of 5,000 or more copies, mailed outside the county of publication) consists of three separate charges: a piece rate, a poundage rate for the editorial portion of the publication, and a poundage rate for the advertising portion that is "zoned" according to distance. In Docket No. R77-1, the Commission adopted for the first time a three-tier piece rate that varies according to the degree of presortation.[93] Mail presorted to carrier route is charged a piece rate of 4.4 cents. Mail presorted to five digit zip code (or three digit zip code for certain cities) is charged a piece rate of 5.4 cents. All other second-class regular rate is charged a piece rate of 7.0 cents.[94] Although Postal Service regulations require that all second-class mail be presorted to the greatest extent possible,[95] the two presort "discounts" are available only where the presorted mail is sorted into sacks either at least one-third full or weighing at least 20 pounds.

American Business Press (ABP) attacks the limitation on eligibility for the presort discount as discriminatory against smaller publications that cannot fill one-third sacks when the presorting is to five digit zip codes, either because of low circulation or wide geographic dispersion. Record evidence suggested that only a small percentage of all publications would be eligible for the discounts,[96] although approximately 77 percent of regular

[93] PRC Op. at 303-32.

[94] *Id.*, App. 1, schedule B-4.

[95] Postal Service Manual § 125.326.

[96] OOC Witness Bentley cited a USPS study indicating that 131 publications (1%) would benefit, while 12,662 others would not. R. 4-02621.

rate mail, by volume, would be eligible.[97] ABP argued before the Commission that the proper measure of eligibility for the presort discounts should be the six-copy bundle, the standard prescribed by postal regulations for separating bulk mailing from individual mailings.

We find the Commission's limitations on eligibility supported by the evidence. Postal Service witness McCaffrey stated that the one-third sack requirement in presortation was a standard USPS requirement.[98] Witness Madison found the presort discount justified by cost savings.[99] His study was based, however, on the assumption of a one-third sack limitation. The Commission noted that there was "no correlation between the Madison cost and volume data and the presortation of six piece bundles which is the eligibility requirement sought by ABP." [100] ABP attacks as "not explained" the reliance on the Madison study.[101] Its position presumes that the effect on USPS costs of presortation to six-copy bundles would not differ from the cost effects of presortation to one-third sacks. We cannot ignore or gainsay the likelihood that

[97] PRC Op. at 325.

[98] PRC Op. at 330.

[99] It should be noted that this reliance on cost considerations in designing second-class rates is not a product of the attribution/assignment process mandated by 39 U.S.C. § 3622(b)(3). That subsection extends only to the allocation of costs to the various classes. Rate design within any class is subject only to consideration by the Commission of the remaining criteria enumerated in § 3622(b). In the case of the second-class per piece rate, the Commission concluded that cost considerations were relevant under the criterion of § 3622(b)(6)—"the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect on reducing costs to the Postal Service." PRC Op. at 316-17.

[100] PRC Op. at 330.

[101] Brief for ABP at 30.

the significantly smaller six copy bundle would entail greater handling costs than the one-third sack. Since precise cost data was lacking with regard to the six copy bundle, the PRC was justified, at least in its first attempt at devising a second-class presort discount, in choosing to limit the availability of the discount to those mailings for which it had reliable data.

We find no basis for ABP's claim that, in adopting the second-class rate structure, the PRC focused on one ratemaking criterion—the degree of preparation performed by the mailer [102]—to the exclusion of other factors, particularly the effect of rate increases on mail users.[103]

We read the PRC's opinion as reflecting a full consideration of the pertinent factors. The Commission expressly took into account the interests of small publications—though not to the degree ABP desires—by modifying the presort discount, limited to mailers using five digit zip codes, so as to be available as well to those using three-digit city zip codes (though still subject to the one-third sack restriction).[104] The Commission also rejected a zoned editorial charge, because small publications are least able to avoid the highest zone charges through the device of multiple points of entry.[105]

[102] 39 U.S.C. § 3622(b)(6) (1976).

[103] 39 U.S.C. § 3622(b)(4) (1976).

[104] PRC Op. at 328-29.

[105] ABP claims further that the second-class presort discount, or at least its limitation to the larger one-third sack volumes, violates the First Amendment and the equal protection clause by imposing a "surcharge" on publishers based on circulation. This argument is without merit. ABP places principal reliance on Grosjean v. American Press Co., 297 U.S. 233 (1936). Yet in that case a tax that was imposed on newspapers on the basis of circulation was struck down not because of differential impact, but because it was a "deliberate

B. *Average Weight of Second-Class Publications*

The magazine publishers attack as contrary to the evidence the PRC's adoption of the Postal Service's estimate that the average weight of a second-class regular rate publication in the test year would be 6.1 ounces.[106] They assert that this figure represents an unjustified extrapolation from a recent downward trend in the average weight of second-class publications. Invoking a survey of Magazine Publishers Association (MPA) members, the publishers argue that the downward trend has been reversed, and that average weight has actually increased. The result is a $29 million underestimation of the revenues that will be generated by the two poundage charges, which together account for 52 percent of second-class regular rate revenues.[107]

It is not our function to weigh again evidence that was carefully considered by the PRC.[108] The Commission discounted the MPA study as "inconclusive" because its sample—MPA members—was not necessarily representative of all second-class publications. The Commission further noted that the seeming downward adjustment of average weights in the test year—to 6.1 ounces from the average weight of 6.2 ounces found in fiscal years

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and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled." *Id.* at 250.

There is here, of course, no suggestion that the presort discount is a device to limit circulation of small publications. As a reflection of perceived cost relationships, it is entirely permissible. *See* Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

[106] PRC Op. at 289; R. 4-00786 (table).

[107] PRC App. G, schedule 3, at 7-8.

[108] *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607 618-21 (1966); Environmental Defense Fund v. EPA, 179 U.S.App.D.C. 43, 48-49, 548 F.2d 998, 1003-04 (1976), *cert. denied*, 431 U.S. 925 (1977).

1976 and 1977—was not a downward extrapolation at all, but was merely the product of "rounding the detail actually used in the projection." [109] Finally, the Commission concluded that any increase in revenues resulting from increased weight would be offset, at least partially, by increased costs, and that, even assuming such a revenue excess, the resulting second-class regular rate cost coverage of 105 percent would not be unreasonable.[110] Though the evidence is in conflict, a substantial evidentiary basis for the PRC's decision is present, and we have no warrant to substitute the court's assessment of the evidence for the considered judgment of the Commission.

C. *Attribution of "Individual Load Time"*

The magazine publishers also attack the PRC's conclusion that "individual load time" varies entirely with volume and therefore is 100 percent attributable. "Load time" generally is "the time spent depositing mail in delivery receptacles." [111] Load time is divided into "batch load time" and "individual load time." Batch load time is the "time spent at delivery points placing batched

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[109] PRC Op. at 289.

[110] *Id.* at 289-90.

[111] R. 4-00318. The costs of city delivery carriers are divided between in-office costs (Cost Segment VI) and out-of-office or street function costs (Segment VII). In-office costs are those entailed in sorting, placing mail in sequence, "marking up" mail (*e.g.*, noting changes of address), and loading mail into vehicles. The street function, in turn, is divided into several subfunctions. "Travel time" is the time spent going from the carrier station to the first delivery point and back to the station from the last delivery point. "Route time" is the time spent by the carrier traversing the active portion of his route, but not including the time spent deviating to the delivery points. "Access time" is the time the carrier spends going to and from each delivery point. "Load time" is the time spent handling mail at the delivery receptacles and the time spent at relay and collection boxes.

letter size mail in receptacles or otherwise delivering mail in batches." [112] Individual load time is the "time spent at delivery points placing individual pieces of mail into receptacles or otherwise delivering individual pieces." [113]

Since letter-size mail is "batched," individually loaded mail consists primarily of second-class publications. Because, in theory, individual loading requires a separate step for each piece, the Commission has consistently found it 100 percent variable with volume, and has attributed individual load time costs, primarily to second-class. The magazines allege that this attribution is patently arbitrary because it proceeds from an assumption that a carrier at a delivery point will load batches and magazines in separate steps, rather than by first combining the magazine with the batch and placing them into the receptacle together.

There is some force to the magazines' position. The Commission concluded that load time includes "all time involved handling mail at the receptacle." [114] Under this view, even if the magazines were correct in their point, load time would include the time spent combining the batches and the individual pieces. This does not entirely jibe with the definitions of load time, which seem to restrict that function to the act of placing mail in the receptacle. The problem appears to stem from a deficiency in accurate data as to the proportion of second-class regular rate mail that is loaded individually,[115] and uncertainty as to where in the cost model to account for the steps of combining the individual pieces and batches.[116]

[112] R. 4-00326.

[113] R. 4-00327.

[114] PRC App. J at 98.

[115] *Id.*

[116] PRC App. E at 19.

Despite some misgivings, we are not inclined to remand on this point alone, in view of its relative lack of consequence and the fact that the PRC has insisted upon improved data in future proceedings. Postal ratemaking continues to evolve and we cannot yet expect USPS and PRC to have gleaned every bit of data and developed every model to perfection. Considering the PRC's immense task in digesting huge quantities of data and meeting the requirements of the Act, we believe it a sound approach to forgive such minor transgressions.

VI. Conclusion

We reemphasize our general satisfaction with the Postal Service's and the PRC's performance in the cost allocation aspects of this ratemaking proceeding. In the face of a difficult task, they have proved responsive and responsible. By this we do not intimate, nor do we read the PRC opinion so as to suggest, that the process may remain static. Further improvements are feasible, and expected. That is not only our hope but our premise, and it is on that premise that we affirm the cost allocation decisions.

TAMM, *Circuit Judge*: We are called upon to review decisions of the Board of Governors of the United States Postal Service (Governors) [1] approving the Postal Rate Commission's (PRC) recommended decision [2] in docket no. R77-1, a ratemaking proceeding.[3] The petition for review gives rise to numerous issues involving the Postal Reorganization Act of 1970 (Act) [4] and interpretations thereof.[5] We have considered challenges to postal cost

[1] Pursuant to 39 U.S.C. § 3625 (1976), the Governors issued two decisions in docket no. R77-1: (1) Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services (May 19, 1978) (Governors' Rate Decision); and (2) Decision of the Governors of the United States Postal Service on Changes in the Domestic Mail Classification Schedule Re Citizens' Rate Mail (May 19, 1978) (Governors' CRM Decision). These two decisions are contained in Volume I of the four volumes comprising the action of the Governors.

[2] Postal Rate Commission's Opinion and Recommended Decision, docket no. R77-1 (May 12, 1978). Citation to this decision and its appendices will be indicated in the same manner employed by Judge Leventhal in the companion opinion, *e.g.*, "PRC Op.," "PRC App. B."

[3] As pointed out in the companion opinion at 10, docket no. R77-1 is the fourth general ratemaking proceeding under the Postal Reorganization Act of 1970 (Act), Pub. L. No. 91-375, 84 Stat. 719 (codified throughout 39 U.S.C. §§ 101-5605 (1976)). *See* companion opinion at 10 n.3, for a summarized sequence of prior ratemaking proceedings and judicial review thereof.

[4] *See* note 3 *supra*.

[5] Pursuant to the Act, this court has reviewed prior ratemaking proceedings in National Ass'n of Greeting Card Publishers v. USPS (*NAGCP I*), 569 F.2d 570 (D.C. Cir. 1976) (per curiam), *vacated as to other issues*, 434 U.S. 884 (1977); Association of Am. Publishers, Inc. v. Governors of USPS, 485 F.2d 768 (D.C. Cir. 1973). *See* companion opinion at 10 n.3.

methodology [6] and certain additional claims [7] in the companion opinion penned by Judge Leventhal. We now turn to three final areas of the PRC's and Governors' actions which are questioned on review: (1) the rejection of the citizens' rate mail (CRM) proposal; (2) the provision in the revenue requirement for recovery of accumulated losses; and (3) the imposition of constraints on fourth-class mail rates found to be cost-justified. We treat these challenges *seriatim*.

I. CITIZENS' RATE MAIL

A. *The CRM Proposal*

The Governors initiated the CRM proposal by authorizing [8] the United States Postal Service (Postal Service) to request a recommended decision on a change in the classification schedule that would lead to the adoption of a new subclass for citizens' rate mail, with appropriate rates.[9] CRM, as proposed by the Postal Service, would be a separate first-class service to be used by individuals for the mailing of their personal correspondence. Users of CRM would be entitled to a lower rate of thirteen cents

[6] The Postal Service's cost methodology, in general, involves the allocation of costs among various classes of mail. *See* companion opinion at 27-45 for a discussion of assignment of service-related costs to certain classes of mail.

[7] These various claims include: (1) discrimination against first-class mail; and (2) a challenge to certain specific cost attributions and rate decisions involving second-class mail. *See generally* companion opinion at 45-58.

[8] *See* Governors' CRM Decision at 1-2.

[9] The Governors stated that they authorized this request "after being advised by postal management that the President had stated that he believed it would be in the public interest to pursue the concept of a citizens' rate for the use of consumers. . . ." Governors' CRM Decision at 2.

in exchange for service inferior, to some degree, to regular first-class service, which would be available at a higher rate of sixteen cents. CRM would have to comply with standard size restrictions and be fully zip coded, and would be denoted by a special stamp.

According to the Postal Service's proposal, all first-class mail would be treated alike prior to the delivery stage of the mail process. However, CRM would be "deferrable" in the delivery function.[10] If exigencies required, mail carriers would separate the CRM mail from the first-class mail at the delivery unit, and set aside sufficient CRM to alleviate the immediate delivery problem.[11] While delivery of the remaining regular first-class mail would be accomplished on the first delivery trip, delivery of the segregated CRM would be deferred until the second delivery trip.

The PRC held prolonged hearings on the CRM proposal, and considered briefs, comments filed, and oral argument by the parties to the proceedings and numerous intervenors.[12] The PRC concluded that the evidentiary record did not support the implementation of a CRM

[10] *See* PRC Op. at 195; *see also* companion opinion at 36-37.

[11] Possible situations necessitating delivery deferral, cited by Postal Service witness Jellison, included "a transportation breakdown, freak weather conditions and abnormally heavy household-to-household mailings." PRC Op. at 196.

[12] The establishment of CRM was supported by the National Association of Greeting Card Publishers (NAGCP), the Officer of the Postal Rate Commission, twelve intervenor states, the President of the United States, the Council of Senior Citizens, and the American Coalition of Citizens with Disabilities.

The CRM proposal was opposed by Reader's Digest Association, Inc.; Association of American Publishers, Inc.; Direct Mail/Marketing Association; Magazine Publishers Association, Inc.; Time Inc.; Mail Order Association of America; and Parcel Shippers Association.

service,[13] as requested by the Postal Service, and did not establish that the CRM proposal would meet the service, ratemaking and classification requirements[14] of the Act. As a result, the PRC recommended to the Governors that the CRM proposal not be adopted, and that the regular first-class mail rate be increased only to fifteen cents rather than sixteen cents, as proposed. One week later, the Governors approved the PRC's recommended decision.[15]

The National Association of Greeting Card Publishers (NAGCP)[16] makes a multi-pronged attack on the administrative decisions declining to adopt the CRM proposal. NAGCP contends that the Governors abused their discretion in approving the PRC's recommended decision after finding it not fully acceptable. NAGCP also directly challenges the PRC decision on narrower grounds. NAGCP alleges the PRC erred in determining that: (1) the proposed separate citizens' classification was not justified on the record before the agency; and (2) CRM must bear service-related costs, and the revenue and cost estimates before the PRC were too uncertain.

B. *Governors' Alleged Abuse of Discretion*

NAGCP bases its general objection to the Governors' ratification of the PRC rejection of the CRM proposal on qualifying language employed in the Governors' decision. Although the Governors found that the Commissioner's various opinions did not "add up . . . to a fully

[13] PRC Op. at 182.

[14] *Id.* at 183.

[15] *See* note 1 *supra*.

[16] Petitioner NAGCP leads the attack against the rejection of the CRM proposal. Intervenor Reader's Digest Association, Inc. and the Postal Service defend the Governors' and PRC's action regarding the CRM proposal.

acceptable analysis" [17] and that the PRC was "less than wholly persuasive," [18] the Governors nevertheless approved the PRC decision "with reservations on part of the Commission's analysis." [19] According to NAGCP, the Governors abused their discretion by approving an unacceptable decision.

However, contrary to NAGCP's assertion, the Governors did not approve a decision they found unacceptable. The mere fact that the Governors found the PRC decision to be not "totally acceptable" or "less than wholly persuasive" does not vitiate the Governors' approval. Adherence to NAGCP's line of argument would mandate the Governor's rejection of any PRC decision with which the Governors were not totally satisfied. Such a mandate is unsupported by logic or by statute. The statutory provision applicable to the Governors' action, 39 U.S.C. § 3625 (1976), specifically allows for varying degrees of acceptance or rejection of a PRC recommended decision.[20] The Governors were not forced to choose between total acceptance or total rejection of the PRC decision. They could have, under protest, allowed the recommended decision to take effect and either sought

[17] Governors' CRM Decision at 2.

[18] *Id.* at 5.

[19] *Id.* at 1.

[20] 39 U.S.C. § 3625(a) (1976) states that "the Governors may approve, allow under protest, reject, or modify" the PRC's recommended decision. The Governors' failure to remand the PRC decision rejecting this CRM proposal need not be the death knell of the CRM concept. The Governors indicated their willingness to authorize, in the future, a Postal Service request for a recommended decision on a citizens' rate proposal, which does not limit the subclass to personal correspondence from individuals but draws a distinction between business originated mail and mail sent by individuals. *See* Governors' CRM Decision at 4.

judicial review or returned the recommended decision to the PRC for reconsideration.[21] The Governors alternatively could have chosen to modify the PRC decision themselves. The Governors obviously were not sufficiently dissatisfied with the PRC decision to reject it, allow it under protest, or modify it. We decline to add the judicial veneer of a non-statutory requirement that the Governors find a PRC decision "wholly acceptable" in order to approve it.[22]

C. *Specific Attacks*

NAGCP attacks the PRC's rejection of the CRM proposal as violative of the classification [23] and ratemaking [24] provisions of the Act. The Governors' order, which is the subject of our review, interprets the PRC rejection of the CRM proposal as resting on two basic grounds, only one of which they question as less than wholly persuasive. The Governors read the PRC decision as boiling down to a "recommendation that (1) the record does not support a finding that 'individuals' is a proper grouping for *classification* purposes, and therefore, the proposal violates [39 U.S.C.] § 403(c), and (2) the proposed *rates* for citizens' rate mail do not meet the requirements of [39 U.S.C. §] 3622(b)(3)." [25]

[21] 39 U.S.C. § 3625(c) (1976).

[22] *See generally* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 545-46 (1978) (court may not require more than the minimum statutory procedures or impose procedures designed to achieve the "best" result).

[23] 39 U.S.C. § 3623 (1976). *See also* 39 U.S.C. § 403(c) (1976).

[24] 39 U.S.C. § 3622 (1976).

[25] Governors' CRM Decision at 3 (emphasis added). 39 U.S.C. § 403(c) provides:

> In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall

1. *CRM as a Separate Classification*

The PRC's conclusion that the CRM proposal creates an impermissible classification under section 403(c) is based on two findings: (1) the record reveals no material service distinctions from regular first-class mail justifying a separate classification; and (2) even assuming *arguendo* that a material service distinction exists, the record does not support a finding that household users are a special group qualified for separate classification.[26]

The PRC split over the question whether deferrability of CRM justified a separate classification.[27] The Gov-

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not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

See companion opinion at 14-15 n.13 for the full text of 39 U.S.C. § 3622(b) (1976).

The PRC recommendations rest on its specific conclusions that: (1) CRM, as proposed, would provide essentially the same service as first-class mail but at an unjustified lower rate; (2) CRM rates, as proposed, would not meet costs; (3) service related costs should be assigned to CRM, as proposed, which receives essentially the same service as first-class mail; (4) the revenue reduction resulting from CRM has been understated; and (5) CRM is not necessary to meet the needs of people in their personal letter correspondence. PRC Op. at 183-84.

[26] PRC Op. at 193.

[27] The plurality, Commissioners O'Doherty and Villarreal, noted that the only possible diminution of service for CRM, as compared with regular first-class mail, would occur at the delivery stage. Up to that point, CRM as proposed would be processed and transported on a commingled basis with regular first-class mail. If extreme circumstances warranted

ernors found that the deferrable feature of the CRM proposal distinguished it from regular first-class mail for classification purposes.[28] The Governors therefore considered the alternate PRC ground for its determination that CRM may not be separately classified, *i.e.*, a subclass for use only by individuals is unjustified.[29]

According to the Governors, the PRC inappropriately phrased the crucial classification question as whether 39 U.S.C. § 101(a) (1976)[30] accords a "special status"

(*see* note 11 and accompanying text *supra*), first-class mail would be "riffled" to remove sufficient CRM to alleviate the delivery problem and the CRM would be deferred until the next delivery trip.

The record contains evidence that, barring these unforeseen circumstances, CRM service, as proposed, would be "virtually the same" as regular first-class mail service and "would not be deferred very often." PRC Op. at 197. Further testimony revealed that, "'[a]s a practical matter, there will be little if any discernible difference in the service provided this [CRM] mail.'" *Id.* (quoting letter from Rep. Robert Nix, Chairman of House Committee on Post Office and Civil Service (July 19, 1977)). Moreover, even when these infrequent circumstances would require deferral of CRM, the deferral would involve, at most, a one-trip delay.

Nevertheless, Chairman DuPont believed that the service guaranteed for regular first-class mail sufficiently distinguished it from service proposed for CRM, to support a separate classification. Concurring opinion of Chairman Dupont at 3-6. Vice Chairman Bright also believed that CRM, as a distinct service, demands a separate classification. Dissenting opinion of Vice Chairman Bright at 4-5. (These separate opinions are placed at the end of Volume 1 of the PRC Opinion and Recommended Decision.)

[28] The Governors ruled that the deferrable feature of CRM distinguished it from regular first-class mail on grounds of both speed and reliability. Governors' CRM Decision at 3.

[29] *Id.*

[30] 39 U.S.C. § 101(a) (1976), which defines postal policy, provides, in part, that "[t]he Postal Service shall have as

to "personal correspondence from individuals." [31] Rather, the issue is whether a distinction might be drawn between business originated mail and mail sent by individuals. The Governors found that section 101 was hospitable to such a distinction.[32]

The Governors found the PRC's reasons for its rejection of the CRM proposal as an impermissible classification not wholly persuasive, but did not find the classification issue to be dispositive. Thus, we need not endorse nor condemn the PRC classification conclusion. As noted by the Governors, the statutory scheme may well be hospitable to CRM as a separate classification, and our declination to reach this question does not, by any means, presage a future rejection of a future CRM proposal.

2. *CRM Rates*

After reviewing the PRC classification decision, the Governors considered the remainder of the issues that attended the CRM rate proposal—issues concerning the assignment of service related costs (SRC) to CRM and the record's uncertainties in the subclass' volume, revenue, and effect on postal operations.[33]

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its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people."

Consideration of this policy in classification decisions is mandated by 39 U.S.C. § 3623(c), which provides, in part, that "[t]he Commission shall make a recommended decision on establishing or changing the [mail classification] schedule in accordance with the *policies* of this title. . . ." (emphasis added).

[31] Governors' CRM Decision at 4.

[32] *Id.*

[33] *Id.*

a. *Assignment of Service Related Costs to CRM*

In determining the unit costs for CRM, the Postal Service did not assign to CRM any service related costs.[34] The PRC decided that exemption of CRM from SRC assignment would be proper only if "CRM could be deferred on an operational basis to meet Postal Service needs should appropriate occasion therefore arise." [35] Based on the evidence, the PRC concluded that CRM is not easily separable from "preferential mail," which requires immediate delivery,[36] and thus, not readily susceptible to actually being deferred at any point in the mailstream.[37] The PRC decided that insufficient operational diminution in first-class service for CRM existed, due to the likely infrequency of deferral of CRM [38] and the resultant minimal delay in delivery, to warrant the total exemption of CRM from SRC.[39]

NAGCP claims that the same material service differences which persuaded the PRC to endorse assignment of SRC to preferential mail and nonassignment of SRC to nonpreferential mail [40] support assignment of SRC to regular first-class mail and nonassignment of SRC to deferrable CRM. Therefore, NAGCP asserts, the PRC discriminatorily assigned SRC across the board to all first-class mail, while drawing finer and more accurate

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[34] *See* companion opinion at 10-11.

[35] PRC Op. at 211.

[36] *See* companion opinion at 32-33.

[37] In this respect, CRM may be contrasted with nonpreferential mail, which is susceptible of actually being deferred at any point in the mailstream. PRC Op. at 211.

[38] *Id.* at 199.

[39] *Id.* at 213.

[40] *See* companion opinion at 36.

distinctions in its assignment of SRC to preferential as opposed to nonpreferential mail.[41]

b. *Uncertainties in Revenue and Cost Estimates*

The PRC determined that uncertainties in the record on CRM's volume, revenue, and effect on postal operations, factors which go to the heart of a rate decision under 39 U.S.C. § 3622(b)(3) and (4),[42] made informed consideration of the CRM proposal impossible. For example, the PRC determined that there was insufficient evidence in the record to estimate CRM volume; and, therefore, it could not estimate the loss in regular first-class mail revenues that would result from CRM, or the revenue that would be produced by CRM itself.[43] The PRC also determined that the Postal Service's cost estimates for CRM were questionable.[44] In general, the PRC concluded that the evidence revealed an extreme range of unlimited uncertainty as to revenue and cost estimates.[45]

According to NAGCP, the PRC's alleged requirement for certainty in estimates was arbitrary and capricious. More specifically, NAGCP points to the inherent uncertainty in estimates for new utility services and to the possible formulation of a compromise estimate based on the existing evidence.

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[41] *See id.* at 37.

[42] *See id.* at 14-15 n.13 for full text of 39 U.S.C. § 3622(b).

[43] PRC Op. at 203-06. The Postal Service's volume estimates were based on studies which the PRC found to be insufficiently similar to the CRM proposal. *Id.* at 205.

[44] *Id.* at 209-17. *See* note 43 *supra*.

[45] PRC Op. at 219.

c. *Judicial Review*

It is the court's function, at this juncture, to determine whether substantial evidence in the record justifies the PRC's rejection of the CRM proposal on the basis of uncertainties in volume, revenue and cost estimates which would render application of the ratemaking criteria in section 3622(b) a futile exercise. It is clear that the PRC did not create an insuperable barrier of certainty for the CRM proposal. It merely concluded that adequate information was not available in the record by which a reasonable estimate could be made. The lack of information is understandable in light of the late stage at which CRM was introduced.[46] The PRC concluded that the Postal Service's revenue estimates were based on questionable studies,[47] and that questions concerning assignment of SRC to CRM eroded the Postal Service's cost estimates. In light of these uncertainties in the record, we conclude that the PRC's rejection of CRM was based on substantial evidence.

The issue whether *vel non* CRM should bear SRC further obfuscates the uncertain CRM cost estimates. We are unpersuaded by NAGCP's attempt to analogize nonassignment of SRC to nonpreferential mail, with that of nonassignment of SRC to CRM. The overall level of service received by nonpreferential mail justifies disparate SRC assignments,[48] but there are no comparable

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[46] According to Chairman DuPont, "[i]t is common knowledge that the CRM idea was suggested at a late stage in the preparation of this rate request. Clearly the Service could not, in the time available, undertake the foundation, baseline studies which ideally should precede such a major new proposal." Concurring opinion of Chairman DuPont at 11.

[47] *See* note 43 *supra*.

[48] *See* companion opinion at 36-37. On the record of this ratemaking proceeding, we cannot hold that the PRC abused its discretion in not assigning SRC to nonpreferential classes. *See id.* at 38.

differences in overall levels of service between the proposed CRM and regular [49] first-class mail. In contrast to its finding on nonpreferential mail, the PRC found that the infrequency of deferral of CRM and the resultant minimal delay, did not support the necessary finding that CRM could be deferred on an operational basis. Thus, it concluded that CRM as proposed should bear at least a portion of SRC. This is not to say that an across-the-board assignment of SRC to all first-class mail, both to CRM and regular first-class, is warranted. We have noted our concern, in the context of the treatment of "red tag" mail and other regular rate second-class, that the assignment of SRC reflect service priorities within a class.[50]

We need not decide whether CRM should be totally assigned, or exempt from, SRC. Rather, we find that if CRM is to bear SRC, such assignment should be finely tuned. The record clearly does not provide complete data to compute a ratio of assignable SRC to CRM. The fact that the PRC declined to take the initiative to formulate such a ratio based on the Postal Service's estimates and those of other parties, does not constitute an abuse of discretion nor arbitrary or capricious action.

D. *Conclusion*

In sum, we affirm the Governors' order which accepts the PRC recommendation to reject the CRM proposal. However, we, like the Governors, do not rest our decision on the PRC classification conclusion. Rather, we agree with the Governors and the PRC that the wide range of uncertainties in the record surrounding the CRM proposal rendered rational and informed application of the ratemaking provision [51] a near impossibility.

[49] *See id.* at 36-37.

[50] *See id.* at 43-45.

[51] 39 U.S.C. § 3622(b).

However, we emphasize that our decision is strictly limited to the CRM proposal and the record in this ratemaking proceeding. Our affirmation of the PRC's rejection of this CRM proposal does not imply that future CRM proposals, supported by a fuller, more substantial record, should be rejected. By contrast, we echo Chairman DuPont's encouragement to the Postal Service to restudy the CRM concept and offer a new proposal in future proceedings.[52]

II. Prior Years' Losses

We now turn to the question whether the Postal Service may include a provision for the recovery of prior years' operating losses in its revenue requirement under 39 U.S.C. § 3621 (1976).[53] The PRC [54] and the Governors [55] first approved this practice in the 1976 ratemaking proceeding (docket no. R76-1), review of which was dismissed as moot.[56] The PRC's and Governors' decisions in the proceedings now under review approved the recovery of this item in the revenue requirement, relying almost entirely on their 1976 decisions. We

[52] *See* concurring opinion of Chairman DuPont at 11.

[53] Petitioners Time Inc., Magazine Publishers Association, Inc., and intervenors Association of American Publishers, Inc. and the Recording Industry Association of America, Inc. lead the challenge against the inclusion of prior years' losses in the revenue requirement. We shall simply refer to these parties as petitioners.

[54] Opinion and Recommended Decision of June 30, 1976, Docket No. R76-1 (No. R76-1 PRC Op.).

[55] Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services (July 7, 1976) (No. R76-1 Governors' Decision).

[56] National Association of Greeting Card Publishers v. USPS, No. 76-1611 (dismissed as moot in Memorandum Opinion and Order of June 27, 1978).

hold that the language of 39 U.S.C. § 3621 and the legislative intent underlying the Act [57] allow the Postal Service, in the exercise of its sound economic judgment, to recover these accumulated operating deficits through the revenue requirement in these proceedings.

A. *39 U.S.C. § 3621*

The fiscally sound operation of any organization rests upon the maintenance of a balance between costs and income. The statutory mandate of 39 U.S.C. § 3621, which applies this economic principle to the Postal Service, provides in part:

> Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. For purposes of this section, "total estimated costs" shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies.

Pursuant to this "break-even" standard, the Postal Service must set its postal rates and fees at a level which ensures that costs are met by income from rates and fees and by appropriations. The Postal Service's "revenue requirement," which represents the overall amount of income which must be collected from rates and fees, thus forms the basis for determining appropriate rates for postal services.

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[57] *See* note 3 *supra*.

B. *Scope of Review*

The PRC decision before us states "that the requested provision for recovery of prior year losses is reasonable and in accord with precedent established in Docket No. R76-1." [58] Due to the relatively cursory treatment of this issue in the PRC decision now under review, we have looked to the PRC decision in docket no. R76-1 for the explanation of this item and the rationale supporting its inclusion in the revenue requirement.[59] Our scope of review is limited to whether a fair reading of section 3621 and the legislative intent of the Act provide authority for the Postal Service's election to recoup prior years' losses through the revenue requirement, rather than through borrowing or appropriations.

C. *Computation of Prior Years' Losses*

Operating deficits have plagued the Postal Service for decades.[60] The Act was passed to solve this problem, but unfortunately the Act's goals have failed to reach fruition. The Postal Service has continued to incur operating losses.[61] It has attempted to offset these losses by

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[58] PRC Op. at 43.

[59] Judicial examination of the decision in docket no. R76-1 is permissible under Functional Music, Inc. v. FCC, 274 F.2d 543, 546-47 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959), in which this court examined prior agency action on which the validity of the later agency action under review depended. *See, e.g.*, Network Project v. FCC, 511 F.2d 786, 789 n.1 (D.C. Cir. 1975).

[60] In 1970, when the Act was passed, Congress noted: "The Post Office chronically operates at a huge deficit, expected to exceed $1.4 billion in the current fiscal year." H. R. REP. No. 1104, 91st Cong., 2d Sess. 5 (1970).

[61] *See also* 122 CONG. REC. S14418 (daily ed. Aug. 24, 1976) (remarks of Sen. McGee) ("One of the burdens of this new postal system was that they had to address themselves to an accumulated problem over the past 20 years or so all in one year or 2 years, or try to.").

drawing down working capital,[62] incurring debt,[63] reducing services, and increasing rates.[64] The Postal Service has also turned to Congress seeking appropriations. *See* Postal Reorganization Act Amendments of 1976 (1976 Amendments).[65]

In the proceeding now under review, the Postal Service computed the total amount of unrecovered prior years' losses at $2.336 billion,[66] which is the excess of

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[62] In No. R76-1 PRC Op. at 45-46, the PRC stated that "[n]et working capital (i.e., an excess of current assets over current liabilities) is a necessity for the continued operation of a business, and from the accounting standpoint such net working capital would be considered a part of equity."

[63] By 1976, the Postal Service had deepened its insolvency through annual resort to off-budget borrowing for operating expenses. The Postal Service had been unable to meet the schedule for repayment of operating debt and had been forced to "roll-over" debt obligations as they became due. *See* S. REP. No. 966, 94th Cong., 2d Sess. 3 (1976). *See* note 69 *infra*.

[64] Congress has noted the ineffectiveness of prolonged rate-making proceedings:

> The most recently completed rate case . . . took 2 years from start to finish, during which time the inexorable increase in the cost of doing business outpaced revenues. Had the case been decided 6 months earlier, . . . the Service's fiscal year 1976 operating deficit likely would have been wiped out and a small surplus might have been realized.

S. REP. No. 966, 94th Cong., 2d Sess. at 7.

[65] Postal Reorganization Act Amendments of 1976 (1976 Amendments), Pub. L. No. 94-421, 90 Stat. 1303 (codified throughout 39 U.S.C. §§ 101-5605 (1976)). *See* note 67 *infra*.

[66] The PRC considered the following table (footnotes omitted):

net operating losses and deficits from 1971 to 1978 over the $1 billion subsidy appropriated by Congress in the 1976 Amendments.[67] The PRC proposes to recover the $2.336 billion over a seven year period, from 1978 to 1985, thus yielding an annual recovery of $334 million.[68] It is the inclusion of this $334 million in the revenue requirement as recovery of prior years' losses which petitioners challenge.

Although the PRC decision under review fails to provide us with a detailed breakdown of the composition of the $334 million, it is apparent that these losses have a hybrid nature: (1) a portion of the prior years' losses

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PRIOR YEAR LOSSES

	(Millions)
Net Operating Losses July 1, 1971 through September 30, 1976	$2,776
Estimated Deficit in FY 77	203
Estimated Deficit October 1, 1977 to March 24, 1978	357
Less: Subsidy pursuant to Pub. L. No. 94-421	1,000
Total Recovery Over 7-Year Period (1978-1985)	$2,336

PRC Op. at 43.

[67] 1976 Amendments, Pub. L. No. 94-421, § 2(b), 90 Stat. 1303 (codified at 39 U.S.C. § 2401(d) (1976)). Spurred by the problems of reduction in service, increasing postal rates, and a continuing operating indebtedness which the Postal Service faced, Congress enacted these amendments which: (1) authorized two appropriations in the amount of $500 million each to be applied against the accumulated operating indebtedness of the Postal Service; (2) prohibited certain service cuts during the subsidy period; and (3) allowed no postal rate increase during that same period. *See* S. REP. No. 966, 94th Cong., 2d Sess. (1976).

[68] *See* No. R76-1 PRC Op. at 42-44 for a discussion of the reasonableness of the Postal Service's proposal of a seven year amortization period.

are represented by operating debt; (2) the remaining segment is not represented by debt obligations, but was incurred by drawing down working capital.[69]

D. *Recovery of Losses Represented by Debt*

Under 39 U.S.C. § 2005(a) (1976),[70] the Postal Service is authorized to borrow money to meet operating expenses and to issue obligations therefor. "The Postal Service may . . . pledge and use its revenues and receipts for the payment of the principal of or interest on such obligations." 39 U.S.C. § 2005(b) (1976). The resultant debt obligations, according to the PRC, are includible in the revenue requirements under section 3621, as "debt

[69] *See* PRC Op. at 44. In docket no. R76-1, the past operating losses sought to be recovered were $1.454 billion, in seven annual installments of $207.8 million. These losses had been incurred in fiscal year 1972 to fiscal year 1975. Over two-thirds of the $1.454 billion was represented by debt, in the form of two promissory notes of $500 million each, held by the Federal Financing Bank and executed by the Postal Service, to finance operating expenses in the fiscal years 1975 and 1976. *See id.* at 31 n.3.

The principal scheduled to be repaid on the two promissory notes executed to cover 1975-1976 operating expenses amounted to $200 million annually for the five fiscal years 1976 through 1980. *See* No. R76-1 PRC App. A at 2. Assuming that $600 million in principal remains to be repaid from fiscal year 1978 to fiscal year 1980, one may conclude that at least $600 million, or approximately one-fourth, of the $2.336 billion in prior years' losses sought to be recovered in this ratemaking proceeding, is represented by debt obligations.

[70] 39 U.S.C. § 2005(a) (1976) provides, in part:

> The Postal Service is authorized to borrow money and to issue and sell such obligations as it determines necessary to carry out the purposes of this title. . . . In any one fiscal year . . . the net increase in the amount of obligations outstanding issued for the purpose of defraying operating expenses of the Postal Service shall not exceed $500,000,000.

service (including . . . provision for sinking funds or other *retirements of obligations* to the extent that such provision exceeds applicable depreciation charges)...." [71]

Petitioners assert that the term "total estimated costs," as used in section 3621, limits costs that may be included in the revenue requirement to those that will be incurred in a future period. They also contend that the phrase, "to the extent that such provision exceeds applicable depreciation charges," limits debt service that may be included in the revenue requirement to those debts incurred for capital purposes. They conclude that debt incurred for operating expense, which is nondepreciable, is thus nonincludible in the revenue requirement under section 3621.

The PRC decision in docket no. R76-1, upon which the PRC and the Governors relied in this case, considered sections 2005 and 3621 together and interpreted section 3621 as permitting recovery of an amount for payment of obligations issued pursuant to section 2005.[72] The PRC decision also rejected the "capital debt" argument that petitioners advance in this court. The PRC explained that the limitation on recovery of debts "to the extent that such provision exceeds applicable depreciation charges" merely prevents double recovery in the revenue requirement, once through depreciation charges and again through charges for debt service.[73]

We find that the plain language of section 3621 clearly supports the recovery, through the revenue requirement, of prior years' losses represented by debt. A commonsense reading of the statute refutes the restriction of "estimated costs" to costs that are incurred in the fu-

[71] 39 U.S.C. § 3621 (1976) (emphasis added).

[72] No. R76-1 PRC Op. at 27.

[73] *Id.* at 32-33; *see* text at 73 *supra*.

ture.[74] The statutory language permitting recovery of an amount for "retirement of debt obligations" clearly denotes recovery for costs (debt obligations) incurred in prior years.[75]

We also conclude that the language of section 3621 does not support a narrow reading of "debt service" that would restrict it to debt incurred for capital expenses. Congress specifically provided that the Postal Service could incur debt both for capital improvements and for operating expenses. It differentiated between the two outlays in section 2005(a) solely for the purpose of setting a debt ceiling in connection with operating expenses. Congress declined to distinguish between the capital or noncapital purposes for which debt had been incurred when it provided for the inclusion of debt service in the revenue requirement under section 3621. The fact that depreciation charges must be deducted when including a provision for capital debt in the revenue requirement does not mean that a provision for noncapital debt cannot be included in the revenue requirement at all.

As a broad challenge to the recovery of prior years' losses, whether *vel non* represented by debt, petitioners also cite the conventional public utility rule which eschews

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[74] We heed the same reminder that cautioned the court in *NAGCP I*:

> We are reminded on numerous occasions that "'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'" *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370, 45 S.Ct. 274, 276, 69 L.Ed. 660 (1925), *quoted in Chandler v. Roudebush*, 425 U.S. 840, 847, 96 S.Ct. 1949, 1953, 48 L.Ed.2d 416 (1976).

569 F.2d at 596 n.113.

[75] *See* 39 U.S.C. § 2005(b) (1976).

recovery of past losses in current rates. *Galveston Electric Co. v. Galveston*, 258 U.S. 388, 393 (1922). Recognizing that its interpretation may represent a departure from this conventional rule of regulatory practice, the PRC questioned the rule's applicability to a nonprofit organization, such as the Postal Service, which operates on a statutory break-even standard and may not recoup prior years' losses through later profits.[76]

We do not find that the recovery of prior years' losses is barred by a public utility rule barring recovery of prior losses in current rates. *See Galveston Electric Co. v. Galveston*, 258 U.S. at 393; *Communications Satellite Corp. v. FCC*, No. 75-2193, slip op. at 22 n.19 (D.C. Cir. Oct. 14, 1977). Even if the Postal Service were treated as a conventional utility, the rule might be inapplicable in view of the restrictive circumstances surrounding the Postal Service's financial decline.[77] In any event, it would be incongruous for us to clamp the shackles of a narrow rule onto the Postmaster General's attempt to return the Postal Service to financial stability, especially in light of the congressional intent to provide the Postal Service with the "unfettered authority and freedom it has been denied for years to maintain and operate an efficient service."[78] Therefore, section 3621 statutorily authorizes the recovery of prior years' operating losses represented by debt through inclusion in the revenue requirement.

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[76] PRC Op. at 45 (citing No. R76-1 PRC Op. at 25-30).

[77] *See* Communications Satellite Corp. v. FCC, No. 75-2193, slip op. at 22 n.19 (D.C. Cir. Oct. 14, 1977) (where a history of agency strictures have prevented a reasonable rate of return, a company might be entitled to recover its losses).

[78] S. REP. No. 912, 91st Cong., 2d Sess. 2 (1970).

E. *Recovery of Losses Not Represented by Debt Obligations*

The issue whether the Postal Service is authorized to recover prior years' losses not represented by debt obligations through inclusion in the revenue requirement is not as easily decided. The PRC relied primarily on congressional intent and the policy of the Act to justify inclusion of these losses under section 3621. The PRC pointed out that one of the major policy determinations of the Act was to give postal management the flexibility to operate an efficient and economical postal system.[79] It would be inconsistent with this policy, the PRC reasoned, to limit recovery of losses only to those represented by debt, because this would compel the Postal Service to borrow, and thereby incur attendant interest expense, when the cash needs of the Postal Service would permit drawing down existing funds.[80] The PRC concluded that " 'the general principles of postal self-sufficiency which underlie the Postal Reorganization Act contemplate the recovery of prior year losses through rates and fees,' to an extent not limited to those losses represented by debt." [81]

The Postal Service points out in this court that Congress, in directing that " 'total estimated costs' shall *include (without limitation)* operating expenses, depreciation . . ., debt service . . ., and a reasonable provision

[79] *See, e.g., id.;* H. R. REP. No. 1104, 91st Cong., 2d Sess. 2, 5 (1970).

[80] PRC Op. at 44; *see* No. R76-1 PRC Op. at 39.

[81] PRC Op. at 44 (quoting No. R76-1 PRC Op. at 40). *See also* Direct Mail Advertising Ass'n v. USPS, 458 F.2d 813, 814 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972) ("one of [the Act's] principal goals was that eventually the postal service would become self-sufficient: be able to operate on the revenue received from postal rates and fees without the assistance of congressional appropriations.").

for contingencies," [82] clearly created a non-exclusive list of costs to be included in the revenue requirement. The Postal Service also asserts that principles of statutory interpretation accord weight to the PRC's application of a broad statutory term [83] and that the PRC's decision was within the range of permissible choices contemplated by statute.[84] The Postal Service contends that congressional intent justifies the inclusion in the revenue requirement of losses not represented by debt because these prior years' losses were incurred as an alternative to borrowing, and allowing their inclusion in the revenue requirement would serve a purpose similar to the provision for retirement of debt obligations.

In opposition, petitioners maintain that only an "open-ended, virtually unlimited construction" of the "without limitation" language in section 3621 would justify the inclusion in the revenue requirement of prior years' losses not represented by debt.[85] Finally, opposing parties make the economic policy arguments that blanket recovery of prior years' losses through rates is a strong disincentive to the efficient and economical management mandated by the Act, and that inclusion of prior years' losses will permit rates to be set at levels resulting in a statutorily impermissible profit.

Upon consideration of the parties' numerous arguments, and after examination of the legislative history of the Act, we hold that the Postal Service's election in

[82] 39 U.S.C. § 3621 (emphasis added).

[83] Brief for Appellee at 48 (citing NLRB v. Hearst Publications, 322 U.S. 111, 131 (1944)).

[84] *Id.* at 49 (citing Hardin v. Kentucky Utilities Co., 390 U.S. 1, 8 (1968)).

[85] Brief for Intervenors Association of American Publishers, Inc. and Recording Industry Association of America, Inc. (Brief for Intervenors) at 5.

these proceedings to recover prior years' losses not represented by debt through inclusion in the revenue requirement under section 3621 comports with the legislative intent of the Act and is statutorily permissible. Although losses not represented by debt are not explicitly enumerated as includible in the revenue requirement under section 3621, we do not find this to be a bar. The plain language of the statute provides that " 'total estimated costs' shall *include (without limitation)*" [86] the enumerated items. We are hard-pressed to envision language less restrictive than this.[87]

This is not to say, however, that the term "total estimated costs" is so broad as to be without meaning, or that the phrase "without limitation" grants the Postal Service *carte blanche* to include any amount as costs in the revenue requirement. The question whether a particular cost is includible "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially." *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). Its determination "is entitled to acceptance unless it lies outside the range of permissible choices contemplated by the statute." *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 8 (1968).

In specifying items as "costs" within the meaning of section 3621, the "range of permissible choices contemplated by the statute" includes costs which are demonstrably related to those specifically enumerated in section 3621. The prior years' losses in question are demonstrably related to operating expenses, which are enumerated in section 3621, because they were incurred to pay for

[86] 39 U.S.C. § 3621 (emphasis added).

[87] As the House Committee on Post Office and Civil Service explained in its sectional analysis of the Act, "[t]he term 'costs' is taken in its broad economic sense . . . ." H. R. REP. No. 1104, 91st Cong., 2d Sess. 40 (1970).

operating expenses. Moreover, prior years' losses not represented by debt are of the same character as those losses represented by debt, which the plain language of the statute clearly authorizes,[88] because the former were incurred as an alternative to the latter. To hold that the recovery of the losses in question is barred because they are not represented by formal debt would be unduly formalistic and in contravention of the specific statutory purpose of maintaining a financially stable enterprise that operates on a "break-even" basis.

Consideration of the legislative history of the Act convinces us that the Postal Service's determination has "reasonable support in relation to the statutory purpose." *Hardin v. Kentucky Utilities Co.*, 390 U.S. at 9. In enacting the legislation in question, Congress responded to the severe and imminently catastrophic financial crisis with which this nation's postal system was faced.[89] Prior to the Act, the postal system was caught in a seemingly hopeless situation of chronic debt and disorganization. Its descent into bankruptcy and financial chaos appeared inevitable, and the then restrictive laws and archaic postal organization made relief unlikely.[90]

Congress then moved affirmatively to rescue the system from impending disaster. It reorganized the postal system and created an independent United States Postal Service. Recognizing this country's need for a viable system of communication by mail, and acknowledging the cumbersome shackles of existing postal regulation, Congress approved the new statutory scheme to meet "the obvious requirement that postal management . . . be

[88] *See* our discussion at 78-79 *supra*.

[89] The postal work stoppage in March 1970, was symptomatic of the widespread breakdown in postal service. *See* H. R. REP. No. 1104, 91st Cong., 2d Sess. 3 (1970).

[90] S. REP. No. 912, 91st Cong., 2d Sess. 2 (1970).

given the unfettered authority and freedom it has been denied for years to maintain and operate an efficient service." [91] This freedom included giving the Postal Service control over costs as well as the tools with which to exercise that control.[92] The tools include the power to borrow,[93] to raise revenues from ratemaking,[94] and to

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[91] *Id.*

[92] Representative Udall, as one of the sponsors of the bill that became the Act, stated that

> the principal problem facing the Post Office Department was one of no control. There is now no real control over the costs incurred by the Department, . . . and there is little control over the price charged for the services rendered. A major goal of the conferees was to establish in postal management the requisite tools to accomplish these aims.

116 CONG. REC. 27604 (1970) (remarks of Rep. Udall).

[93] Statutory authority for borrowing rests in 39 U.S.C. § 2005 (1976), which permits the Postal Service to borrow money either from the Secretary of the Treasury or upon the open market in an amount not to exceed $10 billion outstanding in obligations at any one time. The Senate Committee on Post Office and Civil Service cautioned the Postal Service "that if borrowed money is used to meet current operating expenses, lenders will charge a very high premium. Thus, the use of bond revenue for operating expenses should be restricted to the most unusual circumstances." S. REP. No. 912, 91st Cong., 2d Sess. 9 (1970). The committee further expressed its hope, and caveat, that the Postal Service would "give the highest consideration to the public interest in the entire matter of selling bonds and using bond revenue." *Id.* at 9-10.

[94] Authority to fix rates and classes rests in the Postal Service pursuant to 39 U.S.C. § 3621. Discussion of the possibility of an accumulated operating deficit arose in 1970, before the Act was passed. In response to the unfortunately prophetic concern voiced by Representative Pucinski regarding how the Postal Service would finance its mounting deficits, Representative Dulski, one of the bill's sponsors, answered: "You will find in this bill provision for the necessary

seek appropriations.[95]

When continually mounting deficits and the sluggish movement of ratemaking proceedings [96] prompted the Postal Service to seek relief from its losses through appropriations in 1976, the congressional spirit of optimism and revitalization which had accompanied the 1970 Act was tempered with the realization that the Postal Service's struggle with operating deficits would continue.[97]

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financing—including a *new system of rate-setting* and authority to borrow up to $10 billion." 116 CONG. REC. 20204 (1970) (remarks of Rep. Dulski) (emphasis added).

[95] The Postal Service was entitled to transitional appropriations under 39 U.S.C. § 2004 (1970) (amended 1976) and is entitled to seek appropriations under 39 U.S.C. § 2401 (1976). However, in enacting the Act, Congress viewed appropriations with a skeptical eye:

> The mandate that the Postal Service must be self-supporting is essential if postal affairs are to be conducted with reasonable economy and efficiency. So long as postal management operates with a general awareness that congressional appropriations are always available, with some uncertin limit, to make good any shortfalls of revenue or overruns of costs, there is little real incentive to make the best possible use of resources . . . . Moreover, the "break-even" requirement of [the Act] represents a commitment that the Postal Service no longer rely on massive annual infusions of general revenues of the Treasury at the taxpayers' expense.

H. R. REP. No. 1104, 91st Cong., 2d Sess. 17 (1970). Representative Udall reiterated the congressional reluctance towards appropriations: "It was my intent, in approving [transitional appropriations], that the Postal Service ultimately stop coming to Congress for annual appropriations and create a self-sufficient enterprise." 116 CONG. REC. 27606 (1970) (remarks of Rep. Udall).

[96] *See* note 64 *supra*.

[97] We recognize that legislative events subsequent to the Act "form a hazardous basis for inferring the intent of an earlier [Congress]." United States v. Price, 361 U.S. 304, 313 (1960), *quoted in* United States v. Philadelphia National

To alleviate part of this pressure, Congress enacted the 1976 Amendments,[98] thereby appropriating $1 billion to be applied to the operating losses for 1976 and 1977. Congress left intact the remaining amount of loss, recovery of which the Postal Service has determined essential to achieve the goal of a financially stable enterprise.[99]

The Postal Service has selected, as its method of financing in this ratemaking proceeding, the inclusion of these losses in the revenue requirement. We do not find its choice an impermissible one in this proceeding, nor do we find it inconsistent with the "central purpose of the [Act] to place the Postal Service on a self-sufficient basis." *Direct Mail Advertising Association v. USPS*, 458 F.2d 813, 819 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 843 (1972). Upon consideration of the legislative history of the Act, we agree that recovery of prior losses not represented by debt in this proceeding has reasonable support in relation to the statutory purpose. *See Hardin v. Kentucky Utilities Co.*, 390 U.S. at 9.

We find the broad economic policy arguments raised by those challenging the recovery of prior years' losses

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Bank, 374 U.S. 321, 349 (1963). However, subsequent legislative events directly pursuant to the Act, are not wholly irrelevant. Therefore, we briefly consider the legislative developments in 1976, which are now embodied in the Act, for a fuller historical view of the economic condition of the Postal Service.

[98] *See* note 65 *supra*.

[99] *See* No. R76-1 PRC Op. at 40-51. In this case, the PRC reiterated that recovery of prior years' losses serves a twofold purpose: (1) to ensure financial stability, and (2) to fulfill the statutory "break-even" requirement. PRC Op. at 47. In practical terms, the PRC pointed out that even with the recovery of $334 million in operating losses, the net deficit in equity will be $611 million, approximately $23 million more than that which existed as of September 30, 1977. *Id.* at 48.

unpersuasive. The various economic strategems and their effects are matters entrusted to the wise discretion and expertise of the Postal Service.[100] We will not substitute our judgment concerning the economic wisdom of its decision to recoup these past operating losses through section 3621, because its decision is consistent with the statutory purposes of the Act—the Postal Service should be financially self-sufficient [101] and should "break even." [102]

The recovery of past losses in the revenue requirement is not to be construed as a mechanism for the approval of costs imprudently incurred.[103] In its recovery of prior years' losses in general, the Postal Service must comply not only with the statutory policy of financial self-sufficiency, but also with the congressional mandate of honesty, efficiency, and economical management.[104] In the context of these ratemaking proceedings, we find that the language and purpose of the Act support the Postal Service's, the PRC's, and the Governors' decisions to allow the recovery of the past operating expenses not represented by debt through inclusion in the revenue requirement under section 3621.

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[100] The Postal Service's annual budget is subject to the scrutiny of the Office of Management and Budget. 39 U.S.C. § 2009 (1976).

[101] Direct Mail Advertising Ass'n v. USPS, 458 F.2d at 814, 817.

[102] 39 U.S.C. § 3621; *see* text at 73 *supra*.

[103] No. R76-1 PRC Op. at 35 n.1. "If a party shows that an expense was imprudently or improperly incurred, the disallowance otherwise proper should not be defeated by the circumstance that the Treasury would in any event have to be repaid." *Id.*

[104] For example, when considering borrowing, the postal service must also heed the reiterated congressional concern that "annual resort to offbudget borrowing for operating expenses can only deepen the Service's insolvency." S. REP. No. 966, 94th Cong., 2d Sess. 3 (1976). *See* note 95 *supra*.

III. Fourth-Class Parcel Post Mail Rates

A final challenge to the PRC's and Governors' decisions focuses on whether the PRC's imposition of "constraints" on fourth-class parcel post rates found to be cost-justified is arbitrary and in violation of 39 U.S.C. § 3622(b) (1976).[105] We affirm the constrained rate schedule for parcel post in this ratemaking proceeding, because the constraints temper the possibly deleterious impact of restructured parcel post rates and advance the statutory goals of the Act. We rely on the PRC's assurance that this interim path of moderation, which is the product of considering the best available evidence in light of § 3622 (b), is not a dead-end but will inevitably lead to a finer tuned compliance with the statutory mandates for ratemaking.[106]

A. *Background*

Parcel post rates have traditionally rested on weight and distance factors. Eight distance-based categories and sixty-nine weight categories[107] intersect to form a matrix of 552 zones for computing parcel post rates. Within each zone, the rate is based on a discrete per piece and per pound charge. In the past, parcel post rate increases have consisted of across-the-board escalations for all of the 552 weight-distance rate cells.

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[105] *See* companion opinion at 14-15 n.13 for full text of 39 U.S.C. § 3622(b).

[106] *See* PRC App. M at 15. We rely on the fact that the parcel post rate structure allowed by our decision will not remain static. *See* Governors' Rate Decision at 6 (directing the postal management to prepare a proposed request to the PRC for a recommended decision to restructure parcel post rates).

[107] The weight categories are segmented into one pound increments ranging from two pounds to 70 pounds.

In an attempt to comply with *NAGCP I*, the Postal Service proposed a new methodology of rate design, which would recover all transportation costs for parcel post through the per pound charge and all remaining costs through the per piece charge.[108] One of the basic assumptions underlying this proposal is that all costs, with the exception of transportation costs,[109] are insensitive to changes in weight up to thirty pounds, and again from thirty pounds to the seventy pound limit.[110]

The PRC was not convinced that the Postal Service's rate design had been verified by empirical methods. It was concerned, moreover, that the drastic rate increases and decreases that would be caused by the proposal would have a harmful effect on users, competitors and the Postal Service. The PRC thus undertook an independent analysis of the rate design.[111]

The PRC's analysis revealed that insufficient evidence supported the proposal's premise that non-transportation costs were insensitive to weight[112] and that the Postal Service incorrectly applied the proposed rate component for transportation costs.[113] The PRC therefore proposed

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[108] The PRC determined that an overall rate increase of more than 35% over existing parcel post rates was necessary.

[109] Non-transportation costs include acceptance, processing, and delivery costs. PRC App. M at 1.

[110] *Id.* The Postal Service proposed to double the per piece charge for parcels over 30 pounds.

[111] *Id.* at 1-16, contains this analysis.

[112] *Id.* at 2. The PRC thus encouraged the Postal Service and other parties "to develop in future proceedings, a more thorough analysis of the relationship between parcel transportation and all other parcel costs with weight and/or cubic feet, distance, and any other cost-causative factors." *Id.* at 2-3.

[113] *Id.* at 10. None of the parties dispute this conclusion. In announcing its conclusion, the PRC stated it hoped the

a modified cost-based rate design based on data from the record.[114] The rates that resulted from the PRC's cost-based development would have effectuated dramatic increases and decreases in the current rates in many rate cells. To diminish the potentially deleterious effects of such drastic changes, the PRC placed the following restrictions on its recommended rates: (1) increases in each rate cell are not to exceed fifty percent of the former rate; and (2) no rate cell may decrease to a rate lower than the old rate.[115] The PRC expressed its hope that the constrained rates would "move [the PRC] and the Postal Service in the direction of more closely cost-based rates."[116] For the interim period, the PRC believed that its constrained rates would more closely reflect costs than the old rates, without creating radical market disturbances.

B. *Arguments Regarding the PRC's and Governors' Decisions*

Petitioners Growers and Shippers League of Florida and Florida Gift Fruit Shippers Association (Fruit

Postal Service and parties would develop a methodology to better describe the nature of transportation cost incurrence. *Id.*

[114] The PRC proposed rates that reflected a "narrowing of the impact of weight upon non-transportation costs by reducing the current structure's four-cents-per-pound weight increment to three-cents-per-pound weight increment." *Id.* at 12. The PRC also increased the non-transportation costs between the 30th and 31st pound increment by an additional 45 cents over and above the normal three-cents-per-pound progression. *Id.* at 13.

[115] *Id.* at 14-15.

[116] *Id.* at 15. The Governors approved the PRC recommendation and directed that postal management prepare a request to the PRC for a recommended decision to restructure parcel post rates. Governors' Rate Decision at 6.

Shippers) argue that the PRC should have adopted a cost-based rate schedule without constraints.[117] They assert that the imposition of arbitrary constraints, which preclude a decrease below former rates, disregards 39 U.S.C. § 3622(b)(3) and is therefore not "fair and equitable," in violation of 39 U.S.C. § 3622(b)(1). Moreover, they allege that using the old rates as a reference point for the constraints is fatal error, because those former rates are unsupported by the evidence and are not tied to cost incurrence. According to the Fruit Shippers, the arbitrary constraints coerce intraclass subsidization, in direct contravention of the mandates of *NAGCP I*.

United Parcel Service of America, Inc. (UPS) intervened to oppose the Fruit Shippers' attack on the PRC's and Governors' decisions.[118] UPS argues that the imposition of constraints is essential to mitigate the potentially deleterious impact of the recommended rate structure, impacts which have not been sufficiently studied and which may result in a radical tilting of the entire parcel post rate structure to the detriment of users, competitors and the Postal Service alike. Furthermore, UPS argues, the focusing of the constraints on former rates is not unreasonable or arbitrary when one considers the cost-basis underlying the old rates.

C. *Determination of the Court*

We agree with the Fruit Shippers that the PRC's recommended rates, without constraints, were formulated in the spirit of *NAGCP I* and section 3622(b)(3) and, therefore, are an improvement over the former rates.

[117] Brief for Appellants Growers and Shippers League of Florida and Florida Gift Fruit Shippers Association (Brief for Fruit Shippers) at 12-16.

[118] The Postal Service presents a one-page defense of the PRC's and Governors' decisions. Brief for Appelleee at 46.

However, sections 3622(b)(4) and (b)(5)[119] require the PRC to consider the effect of rates on the public and competitors.[120] It is clear that insufficient empirical data existed, at the time of the PRC's decision, to assess the impact that the new cost-based rates would have on the public and Postal Service competitors.[121] *NAGCP I* and section 3622(b)(3) do not require myoptic and exclusive adherence to principles of cost-justification, while recklessly ignoring the impact of rates on the other factors enumerated in section 3622(b). The constraints proposed by the PRC are not arbitrary. They are based on former rates which historically have been more tied to cost incurrence than other rates[122] and the impacts of which are known.

We conclude that the interim imposition of constraints, until data is available to assess the impact of cost-based

[119] *See* companion opinion at 14 n.13.

[120] 39 U.S.C. § 403(a) (1976) also mandates that "the Postal Service shall receive, transmit, and deliver . . . parcels, and like materials . . . ." To allow the PRC to ignore the possibly detrimental effect of a new parcel post rate structure on the Postal Service's ability to comply with this statutory mandate, would be in contravention of the intent expressed in § 403(a).

[121] The PRC was concerned about the impact on the market for parcel post that its "ideal rate structure" would cause. PRC App. M. at 15-16. The Governors' Decision shared this concern over the unknown impact of the recommended parcel post rates. Governors' Rate Decision at 5.

[122] Before the Act was passed, parcel post and first-class mail were the only classes with rates which were required to be cost-based. *NAGCP I*, 569 F.2d at 588 n.63 (quoting S. REP. No. 912, 91st Cong., 2d Sess. 10 (1970)). Immediately prior to the Act, the law required that the revenues from parcel post be neither greater nor less than its cost by more than four percent. Act of September 20, 1966, Pub. L. No. 89-593, 80 Stat. 815, 817 (formerly 39 U.S.C. § 4559 (Supp. III 1965-1967)).

rates, is a reasonable compromise at this time. In affirming the PRC's and Governors' decisions, we not only hope, but fully expect, "that the current rates will move [the PRC] and the Postal Service in the direction of more closely cost-based rates."[123]

Affirmed

[123] PRC App. M at 15.

APPENDIX B

Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services

May 19, 1978

Pursuant to the provisions of the Postal Reorganization Act, the Governors of the United States Postal Service hereby approve the Postal Rate Commission's Recommended Decision on Changes in Rates of Postage and Fees for Postal Services, transmitted to the governors on May 12, 1978 (Commission Docket No. R77-1). We take this action after having considered the range of options available to us, to the conclusion that the circumstances that attend our deliberations require that we accept the recommended decision.

The Postal Service's Board of Governors has concurrently determined that the schedules of rates and fees set forth in Appendices I and II hereto, which are the schedules recommended by the Commission in its Recommended Decision of May 12, as amended by the Commission's Errata Notice dated May 18, 1978 , will become effective at 12:01 A.M. on May 29, 1978.

In regard to the phasing schedules set forth in Appendix II hereto, the Decision should not be understood as indicating our concurrence in the Commission's view that it has jurisdiction to recommend phased rate schedules under 39 U.S.C. §3626 or to recommend adjustments under 39 U.S.C. §3627 upon its determination that Congress has failed to appropriate amounts authorized under 39 U.S.C. §2401(c). To the contrary, we reaffirm the view that we have maintained consistently in each of our Decisions on changes in postal rates: the Rate Commission has no jurisdiction over the adoption of phasing schedules under section 3626 or the adjustment of rates to compensate for failures of appropriations under section 3627.

It should be noted the Commission's Recommended Decision includes not only a recommended set of general rate adjustments, but also a distinct and separate recommendation that the changes which the Postal Service had proposed in the Domestic Mail Classification Schedule with respect to the "Citizens' Rate" proposal should not be approved. We address this discrete recommendation concerning the Mail Classification Schedule in a separate Decision which we are also issuing today.

Statement of Explanation and Justification

This is the fourth ratemaking proceeding under the Postal Reorganization Act. Once again, it has been a massive proceeding in scope, often entailing highly complex technical issues and involving 62 intervenors, the filing of thousands of pages of testimony, extensive cross-examination of witnesses, and the compilation of a record of over 12,500 pages. In this case, as in the previous one, the Commission has completed its task and conducted its proceedings with expedition consistent with procedural fairness to the parties, for which it is to be commended.

Much of what we have said in our Decisions on the three preceding rate cases is applicable to this case as well. Those earlier Decisions are matters of public record, and there is no need to repeat them here. Suffice it to say that we have not altered our views on jurisdictional issues on which we have differed with the Commission (including the question of jurisdiction over phasing schedules pursuant to 39 U.S.C. §3626). Nor do we alter our previous expressions of approval of the Commission's opinions on such significant matters as the question of recognizing that a reasonable amount for recovery of prior year losses should be included in the revenue requirement.

In referring to our previous expressions of approval of much of the Commission's earlier opinions, we include reference to the Commission's development of costing and

pricing principles in the second and third rate cases. To a substantial extent, these principles have been drawn in question by the Decision of the U.S. Court of Appeals in *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570, (D.C. Cir., 1976). In this connection, we strongly endorse the Commission's views on the bearing of the Court's Decision in *NAGCP I* on this proceeding; we agree with the Commission's statement that it does not intend its departure in this case from its costing methodology in the previous case to imply a desire to abandon that methodology; and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act.

Although we are approving the Recommended Decision, we do so with reservations about certain parts of the Commission's opinion that lead to some of its rate recommendations.

By way of explaining our earlier remarks concerning the circumstances that attend our deliberations, it bears noting that parcel post rates will increase an average of thirty-five percent, at the rates recommended by the Commission. Further, the Commission has recommended a modestly revised rate structure designed more closely to reflect cost incurrence. As to this latter point, the Commission's achievement is welcome. Our concern centers on the extreme impact that the recommended parcel post rate levels will have on the general public—those individuals and the few business shippers of parcels who, for various reasons, continue to use parcel post. By virtue of 39 U.S.C. 403(a), the Postal Service is directed to "receive, transmit, and deliver throughout the United States . . . parcels and like materials . . . " The ability of the Postal Service to carry out this mandate, saddled with the price levels recommended by the Commission, is greatly impaired, if not nearly exhausted.

We are aware of the Commission's thoughts regarding the relative inflexibility in devising reasonable rates that attends application of the section 3622(b)(3) factor as interpreted by NAGCP I. But in this instance more can and must be done before we can conclude that the egregious results that follow from placing these rates into effect must be suffered by the general public.

These price levels result from the fact that, with a single stroke, the assignable costs of parcel post were increased by the Commission by substantial portions. The implications of this act include the thought that the typical parcel is far more responsible for the six-day delivery system maintained by the Postal Service than is the typical specimen of any other kind of mail—seven times as responsible as the typical daily newspaper or magazine. Nontheless for reasons explicit and implicit in the commission's opinion, we hold no hope for any change in this circumstance were we to return the Commission's Recommended Decision for its reconsideration for further Recommended Decision under 39 U.S.C. 3625(c). Instead, we have directed postal management to prepare for our consideration as members of the Board a proposed request to the Commission for a recommended decision to restructure parcel post rates, and to have that request before us at our September meeting.

In concluding this statement of explanation and justification, we turn briefly to an issue which has not been raised in any previous postal ratemaking proceeding. One party raised the question of whether an Environmental Impact Statement should be required under the National Environmental Policy Act. After careful consideration of this matter, we agree completely with the Commission that an Environmental Impact Statement is not required. In this connection, we note that Postal Service management has continued to give close attention to the applicability of National Environmental Policy Act requirements to the process of making changes in postal rates, fees, and classifications; that an extensive study on the environmental impact of changes in mail rates and classification, dated May 9, 1978, has resulted; and that this study confirms the conclusion that the effects speculative and are plainly not sufficiently significant to give rise to any requirement for an Environmental Impact Statement.

Estimate of Anticipated Revenue

The basis of cost and revenue projection in Commission proceedings is a test period that is prescribed by the Commission's Rules of Practice. In this Docket, under Commission rules, the test year was the period beginning March 25, 1978 and ending March 24, 1979. For this period, the Commission estimates that total postal costs would be about $17.585 billion and that revenues would approximate $17.586 billion, assuming that the recommended rates and fees were in effect for the full test year. Although we adopt these figures as reasonable test year calculations, we note that the Service will not be able to implement new rates until May 29, 1978. Therefore the actual results for the year ending March 24, 1979, will doubtless differ from the Commission's estimates.

Order

Pursuant to the foregoing, the rates and fees set forth in Schedule A through G-19[1] of Appendix I, as appended

[1] There is no need for us to act on the classification schedule revisions in the Commission's recommended Schedule H, which merely reflect the point that the threshold between first-class mail and priority mail has been reduced from 13 ounces to 12 ounces and the point that the rates recommended by the Commission for regular-rate second-class mail include certain presort subcategories. These points are fully and clearly reflected in the rate schedules recommended by the Commission and here approved by us. In our view, these matters are properly covered in the rate schedules and separate classification action is unnecessary.

hereto and incorporated herein, are hereby ordered to be placed in effect.

In accordance with 39 U.S.C. §3626, separate rate schedules for the classes of mail and kinds of mailers identified in section 3626 are hereby adopted, as set forth in schedules 1 through 7 of Appendix II as appended hereto and incorporated herein, and the rates becoming effective shall be those set forth in the "Year 6" column under the heading "Phased Rates".

The Postal Service will place the Decision in effect at 12:01 A.M., on May 29, 1978, in accordance with Resolution Nos. 78-3, 78-4, and 78-5, of the Board of Governors, copies of which are attached.

BY THE GOVERNORS:
M. E. Wright
Chairman

APPENDIX C

Statute Involved

The Postal Reorganization Act, 84 Stat. 719, *et seq.*, as amended, 39 U.S.C. 101 *et seq.*, provides in pertinent part;

§101. Postal policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditions collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equiment designed to create desireable working conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

§3601. Establishment

(a) The Postal Rate Commission is an independent establishment of the executive branch of the Government of the United States. The Commission is composed of 5 Commissioners, appointed by the President, by and with the advice and consent of the Senate. The Commissioners shall be chosen on the basis of their professional qualifications and may be removed by the President only for cause. Not more than 3 of the Commissioners may be adherents of the same political party.

(b) A Commissioner may continue to serve after the expiration of his term until his successor has qualified, except that a Commissioner may not so continue to serve for more than 1 year after the date upon which his term otherwise would expire under section 3602 of this title.

(e) One of the Commissioners shall be designated as Chairman by, and shall serve in the position of Chairman at the pleasure of, the President.

(d) The Commissioners shall by majority vote designate a Vice Chairman of the Commission. The Vice Chairman shall act as Chairman of the Commisison in the absence of the Chairman.

(Amended Pub. L. 94-421, §3, Sept. 24, 1976, 90 Stat. 1304.)

§3602. Terms of Office

The commissioners of the Postal Rate Commission shall serve for terms of 6 years except that—

(1) the terms of the Commissioners first taking office shall expire as designated by the President at the time of appointment, 1 at the end of 2 years, 2 at the end of 4 years, and 2 at the end of 6 years, following the appointment of the first of them; and

(2) any Commissioner appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed shall serve for the remainder of such term

§3622. Rates and fees

(a) From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Ser-

vice may submit such suggestions for rate adjustments as it deems suitable.

(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable of such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Sesrvice;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail or postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

Pub. L. 91-375, Aug. 12, 1970, 84 Stat. 760, amended Pub.L. 94-421, §10, Sept. 24, 1976, 90 Stat. 1311.

§3624. Recommended decisions of Commission

(a) The Postal Rate Commission shall promptly consider a request made under section 3622 or 3623 of this title, except that the Commission shall not recommend a decision until the opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mails, and an officer of the Commission who shall be required to represent the interests of the general public.

(b) In order to conduct its proceedings with utmost expedition consistent with procedural fairness to the parties, the Commission may (without limitation) adopt rules which provide for—

(1) the advance submission of written direct testimony;

(2) the conduct of prehearing conferences to define issues, and for other purposes to insure orderly and expeditious proceedings;

(3) discovery both from the Postal Service and the parties to the proceedings;

(4) limitation of testimony; and

(5) the conduct of the entire proceedings off the record with the consent of the parties.

(c)(1) Except as provided by paragraph (2) of this subsection, in any case in which the Postal Service makes a request under section 3622 of this title for a recommended decision by the Commission on changes in a rate or rates of postage or in a fee or fees for postal services the Commission shall transmit its recommended decision to the Governors under subsection (d) of this section no later than 10 months after receiving any such request from the Postal Service.

(2) In any case in which the Commission determines that the Postal Service has unreasonably delayed consideration of a request made by the Postal Service under section 3622 by failing to respond within a reasonable time to any lawful

order of the Commission, the Commission may extend the 10-month period described in paragraph (1) of this subsection by one day for each day of such delay.

(d) The Commission shall transmit its recommended decision in a rate, fee, or classification matter to the Governors. The recommended decision shall include a statement specifically responsive to the criteria established under section 3622 or 3623, as the case may be.

Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 761, amended Pub.L. 94-421, §(a), Sept. 24, 1976, 90 Stat. 1306.

§3625. Action of the Governors

(a) Upon receiving a recommended decision from the Postal Rate Commission, the Governors may approve, allow under protest, reject, or modify that decision in accordance with the provisions of this section.

(b) The Governors may approve the recommended decision and order the decision placed in effect.

(c) The Governors may, under protest, allow a recommended decision of the Commission to take effect and (1) seek judicial review thereof under section 3628 of this title, or (2) return the recommended decision to the Commission for reconsideration and a further recommended decision, which shall be acted upon under this section and subject to review in accordance with section 3628 of this title.

(d) The Governors may reject the recommended decision of the Commission and the Postal Service may resubmit its request to the Commission for reconsideration. Upon resubmission, the request shall be reconsidered, and a further recommended decision of the Commission shall be acted upon under this section and subject to review in accordance with section 3268[1] of this title. However, with the unanimous written concurrence of all of the Governors

[1] So in original. Probably should be "3628".

then holding office, the Governors may modify any such further recommended decision of the Commission under this subsection if the Governors expressly find that (1) such modification is in accord with the record and the policies of this chapter, and (2) the rates recommended by the Commission are not adequate to provide sufficient total revenues so that total estimated income and appropriations will equal as nearly as practicable estimated total costs.

(e) The decision of the Governors to approve, allow under protest, reject, or modify a recommended decision of the Commission shall be in writing and shall include an estimate of anticipated revenue and a statement of explanation and justification. The decision, the record of the Commission's hearings, and the Commission's recommended decision shall be made generally available at the time the decision is issued and shall be printed and made available for sale by the Public Printer within 10 days following the day the decision is issued.

(f) The Board shall determine the date on which the new rates, fees, the mail classification schedule, and changes in such schedule under this subchapter shall become effective.

Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 762.

§3628. Appellate review

A decision of the Governors to approve, allow under protest, or modify the recommended decision of the Postal Rate Commission may be appealed to any court of appeals of the United States, within 15 days after its publication by the Public Printer, by an aggrieved party who appeared in the proceedings under section 3624(a) of this title. The court shall review the decision, in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, except as otherwise provided in this section, on the basis of the record before the Commission and the Governors.

The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision. The court shall make the matter a preferred cause and shall expedite judgment in every way. The court may not suspend the effectiveness of the changes, or otherwise prevent them from taking effect until final disposition of the suit by the court. No court shall have jurisdiction to review a decision made by the Commission or Governors under this chapter except as provided in this section.

Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 763.

Supreme Court, U. S.
FILED
OCT 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

Nos. 79-377, 79-378, & 79-379

DOW JONES & COMPANY, INC., et al.,
Petitioners,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF UNITED PARCEL SERVICE

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QUESTION PRESENTED FOR REVIEW

Was the court below correct in adhering to its ruling in a prior case that the Postal Reorganization Act of 1970, 39 U. S. C. § 101 *et seq.*, requires postal rates to be based primarily on cost-of-service principles, with costs not so attributed or assigned being recovered through rates established by the application of other ratemaking criteria set forth in the Act?

STATEMENT OF THE CASE

This case involves the proper interpretation of the ratemaking provisions of the Postal Reorganization Act of 1970, as amended ("Act"), 39 U. S. C. § 3621 *et seq.* The record of the underlying administrative proceeding, the fourth general ratemaking proceeding conducted before the Postal Rate Commission ("commission"), consists of over 20,000 pages. Sixty-four parties participated in the proceeding, and 75 witnesses testified before the commission. As a result of its extensive review of the record,[1] the United States Court of Appeals for the District of Columbia Circuit issued a comprehensive, 95-page opinion on June 8, 1979 (Appendix at A1-95).[2]

In its opinion, the court held that the rates recommended by the commission and approved by the Governors of the United States Postal Service (see 39 U. S. C. § 3625) "represent a reasonable response to [the Act's] governing concepts" (Appendix at A12). Accordingly, the court affirmed the order of the Governors approving the commission's rate recommendations.

The court did not advance any new interpretation of the Act or of its ratemaking provisions. On the contrary, it reaffirmed the ratemaking principles laid down by the Act as interpreted in a prior case involving the second ratemaking proceeding conducted under the Act. See **National Association of Greeting Card Publishers v. United States Postal Service,** 569 F. 2d 570 (D. C. Cir. 1976), *vacated in part on other issues not relevant here sub nom.* **United States Postal Service v. Associated Third Class Mail Users,** 434 U. S. 884 (1977) ("**NAGCP I**"). The

1. The court below heard over three hours of oral argument.

2. References herein to the Appendix are to the Appendix filed by petitioners Dow Jones & Company, Inc., *et al.* A separate appendix was subsequently filed by petitioners Magazine Publishers Association, Inc. and Time Incorporated.

NAGCP I decision in turn reflected the views expressed by the court in a unanimous concurring opinion issued in connection with the first ratemaking proceeding. **Association of American Publishers, Inc. v. Board of Governors of the United States Postal Service,** 485 F. 2d 768, 776-79 (D. C. Cir. 1973).

Thus, petitioners do not contend that the court departed from previously established principles of postal ratemaking, nor do they argue that the Postal Service, the commission, or the court misapplied **NAGCP I.** Rather, they seek to obtain here a rejection of the interpretation of the Act articulated on December 28, 1976, in **NAGCP I,** an interpretation which both the Postal Service and the commission sought to follow in the proceeding which is the subject of the instant petitions.

REASONS FOR DENYING THE WRITS

I.

PETITIONERS' ARGUMENT THAT THE COURT OF APPEALS HAS REQUIRED THE COMMISSION TO USE A FULLY ALLOCATED COSTING METHODOLOGY IS PATENTLY ERRONEOUS.

Petitioners contend that the court of appeals has intruded too deeply into the ratemaking process by insisting that the commission impose "fully allocated costs" upon all classes of mail, with the result that all postal costs are allocated on cost-of-service principles to the neglect of market or demand factors. However, it is clear that the court has never required, and that the commission has never applied, a fully allocated costing methodology. Contrary to the impression that petitioners attempt to create, in the administrative proceeding involved here substantial costs remained unattributed and unassigned by the commission on the basis of cost-of-service principles. In fact, the commission attributed and assigned on costing bases less than 75% of total postal costs of approximately $17.6 billion, leaving a "residuum" of costs of approximately $4.5 billion. Commission Opinion and Recommended Decision, Volume 1, page 156.[3]

Clearly, the court's decision in **NAGCP I** has not led the commission to adopt ratemaking methods pursuant to which "practically all" postal costs would be attributed or assigned on cost-of-service principles so that "only an insignificant residuum of costs" would be left to be allocated on the basis of the non-cost factors of the Act. See 569 F. 2d at 604. Instead, more than a quarter of total postal

3. The commission's decision is set forth in a two-volume supplemental appendix filed by petitioner Dow Jones & Company, Inc. (see Petition, page 2).

costs have not been attributed or assigned on costing bases but have been left as "residual" costs.

Thus, petitioners' arguments are based on a complete misunderstanding or distortion of the commission's decision. For example, it is clear that petitioner Dow Jones is simply incorrect when it states (Petition, page 19, n. 12) that, after the application of cost-of-service principles, the costs allocated on the basis of the other criteria of the Act constitute only 7.14% of total costs. The 7.14% referred to by Dow Jones does not represent the "residuum" of unassigned costs, but rather represents $1.3 billion of "service related" costs which were "reasonably assigned" (as opposed to "attributed") by the commission on costing principles. The residuum in this case is an amount nearly four times greater, or $4.5 billion. The alarm expressed by petitioners is clearly unwarranted.

Furthermore, the court has not imposed on the commission any particular costing or ratemaking methods. Indeed, both in **NAGCP I** and in the decision which gave rise to the instant petitions, the court specifically refused to specify any particular methods to be followed by the commission. **NAGCP I,** 569 F. 2d at 590, 592-93; Appendix at A21-23. After reviewing the language of the Act and its legislative history, the court found that Congress intended that "no particular cost accounting system" be used to the exclusion of other costing methods in setting postal rates. S. Rep. No. 912, 91st Cong., 2d Sess. (1970) at page 17. As a result, the court interpreted the ratemaking scheme established in the Act to require that the commission remain open to explore various methods of cost allocation and not restrict itself to the use of only one methodology to attribute and assign costs.

In its decision here, the court has accepted the "service related" costing method first advocated by the

Postal Service and then used by the commission to assign certain postal costs even though, in the court's view, this particular method is probably not the best method or one which the court itself would have chosen (Appendix at A36-46). This is a classic example of judicial deference to, not, as petitioners claim, judicial usurpation of, administrative discretion.

In short, petitioners' attack on the decision below is grounded on the obviously erroneous premise that the rates recommended by the commission are based on fully allocated costing methods which allocate practically all postal costs on the basis of cost-of-service principles in almost total disregard of the other criteria of the Act. Neither the commission nor the court of appeals has ever adopted or even advocated the interpretation of the Act attacked by petitioners. Accordingly, the Court should decline to review the propriety of the "straw man" interpretation raised by petitioners.

II.

THE COURT OF APPEALS CAREFULLY CONSIDERED AND CORRECTLY DECIDED THE STATUTORY INTERPRETATION ISSUES RAISED BY PETITIONERS.

A. Petitioners' Arguments Have Been Fully Considered and Repeatedly Rejected.

Petitioners advocate a restrictive interpretation of the Act's costing provisions which has repeatedly been rejected by all who have considered it, including the commission (see page 11, n. 9, *infra*).

The Court of Appeals for the District of Columbia Circuit has examined the ratemaking provisions of the Act in depth on at least two occasions prior to the decision attacked here.[4] On the first occasion, in which the court (Bazelon, C.J., and Tamm and Wyzanski, JJ.) reviewed and approved the commission's action in the initial ratemaking proceeding under the Act, it analyzed the ratemaking provisions of the Act in a unanimous concurring opinion written by Chief Judge Bazelon. **Association of American Publishers, Inc. v. Board of Governors of the United States Postal Service**, 485 F. 2d 768, 776-79 (1973) ("**Publishers**"). In that opinion, the court examined the language and legislative history of the Act, and suggested that the congressional intent

> ". . . provides a strong indication that . . . discretionary or 'reasonable' assignment of costs should apply only where Postal Service simply *could not* 'attribute' costs. . . . [The Postal Service] would be required to itemize its costs in more detail, determine which classes of service caused them, and attribute those costs solely on that basis." 485 F. 2d at 779 (footnote omitted).

The court upheld the rates there recommended by the commission in light of "the presumptions that surround an initial effort to formulate rates." *Id.* However, it admonished the Postal Service and the commission to "take a hard look" at the extent to which those rates were based on factors other than the costs of the various postal services. *Id.*

The second ratemaking proceeding was also reviewed by the Court of Appeals for the District of Columbia Circuit in **NAGCP I.** This time, Chief Judge Bazelon and Judges Robinson and MacKinnon, in a comprehensive *per curiam* opinion, held that the commission's refusal,

4. The court has also reviewed specific aspects of the ratemaking scheme established by the Act on several other occasions. See 569 F. 2d at 575, n. 2 and accompanying text.

based on an alleged absence of precise statistical measurements, to attribute to the various classes of mail costs which the commission had admitted were attributable (569 F. 2d at 581, 590-91), violated ". . . the express statutory command that in setting postal rates every reasonable effort be made to employ cost-of-service principles to the fullest extent possible." 569 F. 2d at 593.[5]

The instant case involves the fourth general ratemaking proceeding conducted under the Act. In a unanimous *per curiam* order supported by exhaustive opinions for the court by Judges Leventhal and Tamm,[6] the court reaffirmed its holding in **NAGCP I**—a holding which had been foreshadowed by the unanimous concurring opinion in the **Publishers** case—that the Act requires postal rates to be based primarily (though not exclusively) on cost-of-service principles and found that the commission had been responsive to that statutory requirement.

The court in **NAGCP I** had conducted a thorough review of the Act and of its legislative history. See 569 F. 2d at 585-89. It explicitly addressed the specific portion of the legislative history so heavily relied on by petitioners here—the statement of the managers on the part of the House (see, *e.g.*, Petition of American Business Press at pages 11-12)—and found that, contrary to petitioners' claims, the statement supports the view that Congress intended postal rates to be based primarily on cost-of-service principles. See 569 F. 2d at 586, n. 58 and accompanying text. The court's analysis of the Act's

5. Judge MacKinnon filed a concurring opinion in which he stated that ". . . the [court's] opinion [should] not be read as requiring that practically all postal costs be attributed or assigned . . . [on] cost-of-service principles . . . , with the result that only an insignificant residuum of costs are assigned in accordance with the seven remaining statutory considerations." 569 F. 2d at 604.

6. Chief Judge Bryant of the District Court for the District of Columbia was the third member of the panel.

legislative history, which is far more thorough and exhaustive than that presented in the instant petitions, is a full answer to petitioners' contrary arguments.

In the proceeding involved here, the court again reviewed the history of postal ratemaking and the Act's ratemaking standards, and refused to declare that **NAGCP I** was "wrongly decided" or "fatally flawed" (Appendix at A23, n. 23). The court explicitly addressed post-enactment "legislative history" upon which petitioners rely and concluded that congressional rejection of a clarifying amendment considered some five years after the Act was passed does not require a reevaluation of the validity of **NAGCP I** (Appendix at A23, n. 23). Rather, it concluded that **NAGCP I** was correctly decided (Appendix at A19-21).

Thus, a total of seven different judges in three separate cases have reviewed the language of the Act, the Act's legislative history, and the commission's application of the statutory ratemaking standards, and all have concurred that the Act requires the commission to base its rate recommendations primarily on cost-of-service principles. In light of this fact, it is not surprising that the court in this case unanimously denied a suggestion for hearing *en banc* which was based largely on the same arguments advanced in the present petitions.[7]

7. In **NAGCP I,** Judge MacKinnon stated that the Act's requirement of cost-based rates should not be overemphasized so as to negate completely the other factors set forth in the Act. Petitioners rely heavily on language in Judge MacKinnon's concurring opinion in **NAGCP I,** implying that at least he would not agree with the decision at issue here. However, Judge MacKinnon joined in the **NAGCP I** decision now challenged by petitioners. Even more significantly, in the proceeding involved here, not one judge—including Judge MacKinnon—even called for a vote on a suggestion for hearing *en banc* made for the express purpose of seeking to overturn the earlier **NAGCP I** decision. Similarly, in **NAGCP I,** the court denied a petition for rehearing and suggestion for rehearing *en banc*.

Petitioners do not advance any arguments which have not already been thoroughly considered and rejected by different panels of the court of appeals on three separate occasions. Petitioners' belated attempt to attack the established interpretation of the Act advanced in 1976 in **NAGCP I** and foreshadowed in 1973 in **Publishers** should be rejected.

B. Petitioners' Statutory Interpretation Argument Is Without Substance.

Petitioners contend that the court of appeals has erred in interpreting the Act by giving undue weight to the congressional use of the term "requirement" in Section 3622(b)(3),[8] the costing criterion of the Act, and that the

8. Section 3622(b), which sets forth the ratemaking standards of the Act, provides:

"(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the *requirement* that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

costing standard actually set forth in Section 3622(b)(3) was really meant to be the same as the standard of "demonstrably related costs" which was contained in an earlier version of the House bill but which was deleted from the version of the bill which ultimately became the Act. Curiously, petitioners contend that the court of appeals has improperly intruded into the administrative process and refused to defer to the commission's expertise by not adopting an interpretation of the Act which the commission itself rejected eight years ago.[9]

Of course, the court was clearly correct in refusing to ignore the unequivocal language of the Act, which uses the term "requirement" with respect only to the cost recovery criterion of the Act. Congress provided in Section 3622(b) of the Act that the commission "shall" make its recommended rate decisions in accordance with all of the factors set forth in that section. However, it went further in the

8. (Cont'd.)

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate." 39 U. S. C. § 3622(b)(3) (emphasis added).

9. Petitioners Magazine Publishers Association, Inc. and Time Incorporated are clearly incorrect when they state in their petition (page 6) that in the first postal rate proceeding the Postal Service and the commission "evidenced the same general understanding of the Congressional directive, set forth in § 3622(b)." On the contrary, the commission stated in its decision in that proceeding: "If Congress shared the [Postal] Service's costing theories, it certainly refrained from writing them into the statute." **Postal Rate and Fee Increases, 1971,** Docket No. R71-1, Volume 1, Opinion and Recommended Decision at page 1-276. The Postal Service's costing theories were based on the "demonstrably related costs" language, which it had originally proposed. Thus, even before the court of appeals first reviewed the Act in **Publishers,** the commission itself had rejected the statutory interpretation advocated by petitioners here.

case of the cost recovery criterion and characterized that criterion—and that criterion alone—not only as a factor which shall be considered, but as a *requirement*. In light of the elemental principle of statutory construction that effect must be given to all of the words of a statute, 2A Sutherland, **Statutory Construction** § 46.06 (3d rev. ed. 1973), the court would have been remiss had it ignored that phrase and in effect had read it out of the Act, as petitioners contend it should be.

In any event, the court did not stop there. It also examined the other language of the Act and the overall statutory scheme. It went on to make a searching review of the legislative history of the Act and found that the legislative history also demonstrates that postal rates must be based largely on costing principles. Thus, the court's holding is not based solely—or even primarily—on the use of the term "requirement" in Section 3622(b)(3), as petitioners contend.

In arguing that the court below misread the legislative history, petitioners improperly rely on their own view of the "demonstrably related costs" language contained in a prior version of the House bill.[10] Their argument that the rejected phrase "demonstrably related costs" should be seen as the same as the phrase "direct and indirect postal costs attributable . . . plus that portion of all other costs of the Postal Service reasonably assignable" contained in the Act as enacted is based on a brief passage contained in the "Statement of the Managers on the Part of the House" (the "House Managers' Statement") and the remarks of two House members made three days after the Senate had

10. In **NAGCP I,** the court examined the language upon which petitioners base their restrictive view of this costing standard and concluded that it supports the view that postal rates must be based primarily on cost-of-service principles. 569 F. 2d at 586, n. 28 and accompanying text.

agreed to and accepted the report of the Conference Committee.

The Conference Committee purposely deleted the "demonstrably related costs" language in favor of the "direct and indirect attributable" and "reasonably assignable" cost language actually contained in the Act. It is well-established that the adoption of an amendment to or the deletion of a paragraph or phrases from a bill in conference is strong evidence that Congress intended to change the substance and meaning of the original bill. **Gulf Oil Corp. v. Copp Paving Co., Inc.,** 419 U. S. 186, 199-200 (1974); **Cudahy Packing Co. v. Holland,** 315 U. S. 357, 366 (1942).

Even were the rejection of the "demonstrably related costs" concept not so clear, the courts have repeatedly voiced their distrust of regarding as "legislative history" statements made in one House that were not agreed to or acknowledged by the other House. See, *e.g.*, **Pennsylvania Railroad Co. v. International Coal Mining Co.,** 230 U. S. 184, 198-99 (1913); **Davidson v. Gardner,** 370 F. 2d 803, 827-28 (6th Cir. 1966); **The Pietro Campanella,** 73 F. Supp. 18, 27 (D. Md. 1947). Thus, both the House Managers' Statement and the remarks of the two congressmen relied on by petitioners are not proper indicators of legislative intent. Clearly, petitioners' statutory interpretation argument is without merit.

CONCLUSION

Petitioners' attempt to use the decision in question here to obtain this Court's review of an earlier decision of the United States Court of Appeals for the District of Columbia Circuit should be rejected. Petitioners' arguments are based on a purported interpretation of the Act which in fact was not made by the court of appeals, and on the asserted use by the commission of fully allocated costing methods which in fact were not employed by it. Petitioners do not raise any issues which have not already been carefully considered and repeatedly rejected. Since petitioners' claims are so clearly without merit, the petitions should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-377

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and
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v.

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AMERICAN BUSINESS PRESS, INC., *Petitioner,*

v.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS

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October 26, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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---

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS

Respondent National Association of Greeting Card Publishers respectfully requests that this Court deny the petitions for a writ of certiorari, seeking review of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on June 8, 1979 in *National Association of Greeting Card Publishers* v. *United States Postal Service,* No. 78-1448 *et al.*

QUESTION PRESENTED

Whether the court in *NAGCP I* (1976) correctly determined that the decision of the Postal Rate Commission in that case was contrary to the plain language and legislative history of the Postal Reorganization Act because the Commission:

(a) refused to allocate Postal Service costs to the classes of mail causing them except for costs which were short run volume variable; and

(b) allocated more than fifty percent of Postal Service costs based on a highly subjective and unjust inverse elasticity methodology which disproportionately burdened first class mailers and others who are required by law to use the Postal Service?[1]

SUMMARY OF ARGUMENT

Petitioners are seeking review of the wrong case. The question presented was decided three years ago in *NAGCP I* (1976) and petitioners have offered no compelling reason for disturbing the settled law.

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[1] Petitioner American Business Press raises an issue concerning the constitutionality of the Postal Rate Commission's decision with respect to second class presort discounts. Respondent NAGCP takes no position on this issue.

The court, in *NAGCP I* (1976), correctly concluded that the Postal Reorganization Act required attribution of costs to particular classes of mail based on all reasonable inferences of cost causation. The court properly concluded that cost attribution could not be limited solely to those costs which were volume variable. Such a limitation is arbitrary and fails to attribute significant costs which are caused by particular classes of mail.

The court was also correct in refusing to allow allocation of costs, which could not be attributed to particular classes of mail, based on the "inverse elasticity rule." That rule excludes consideration of the statutory factors and has the effect of arbitrarily placing the bulk of the cost of operating the Postal System on first class mailers who have no alternative means of delivery. The purpose of the Act was to avoid such arbitrary and unfair burdens on the public. The Court of Appeals in *NAGCP I* (1976) did no more than give effect to the Postal Reorganization Act's prohibition against undue discrimination or preferences. 39 U.S.C. §§ 101(d), 403(c), 3621 (1976).

STATEMENT OF THE CASE

These petitions technically involve challenges to the validity of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming an order of the Board of Governors of the United States Postal Service approving a recommended decision of the Postal Rate Commission which provided for increases in postal rates and fees. In fact, petitioners are seeking review of a different case.

A. NAGCP and Its Role as Sole Representative of the Citizen Mailer

Respondent National Association of Greeting Card Publishers (NAGCP) is made up of the producers of over 85 percent of all greeting cards sold in the United States. It has participated as an intervenor in every general postal ratemaking proceeding. Due to its interest in maintaining postal rates which will encourage the use of greeting cards, primarily by private citizens, its interests coincide with those of private citizen first class mailers. With the Officer of the Commission who supported the first class mailer before the Commission barred from any role in the appeal, NAGCP alone represents the interests of the citizen mailer.

B. Statutory Background

Under the Postal Reorganization Act of 1970 ("Act"), 84 Stat. 719 *et seq.*, 39 U.S.C. § 101 *et seq.* (1976), postal rate changes are initiated when the United States Postal Service ("Postal Service") petitions the five-member Postal Rate Commission ("Commission") for an increase. 39 U.S.C. § 3622(a). After an evidentiary hearing on the record, the Commission submits a recommended decision to the Board of Governors of the Postal Service ("Governors"). 39 U.S.C. § 3622(b). If adopted by the Governors, the decision is final, subject to judicial review under 39 U.S.C. § 3628.

In accordance with the policy provisions of the Act, rates must be set to provide sufficient revenues so that, when added to appropriations and other income, the Postal Service will break even. Within these guidelines, all postal costs must be apportioned on a fair and equitable basis among all classes of mailers with no undue

discrimination or preferences. 39 U.S.C. §§ 101(d), 403(c), 3621. In apportioning costs, the Commission is directed to consider several ratemaking factors, one of which is cost related. Section 3622(b)(3) of the Act establishes

> the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.

That provision is at the center of this dispute.

C. Proceedings Under the Act

This case arises out of the fourth general ratemaking proceeding under the Act. All four ratemaking proceedings have been reviewed by the United States Court of Appeals for the District of Columbia Circuit.

Case I (1971)—From 6¢ to 8¢ For First Class

The first proceeding (Docket No. R71-1) commenced on February 1, 1971. Under the Postal Service's proposed rate design, only costs which varied proportionately with volume during the test year (49 percent of a total operating budget of approximately ten billion dollars) were attributed to those classes of mail which caused them. The Postal Service argued that short run volume variability was the only permissible manner of determining which costs were caused by each class of service. It further argued that any effort to allocate costs using other reasonable causation inferences was not authorized.

All other costs were allocated based on a single value of service concept. Using the so-called "inverse elas-

ticity rule," two middle-level Postal Service employees made subjective "estimates" of the elasticities of demand for each class of mail and allocated costs in inverse proportion to the relative elasticity of each class. The necessary and intended result of this method was to allocate a disproportionate amount of Postal Service costs to those classes of mail such as first class which are bound to the Postal Service by the private express statutes.[2] In other words, these costs were allocated on the basis of the age old principle of "whatever the traffic will bear." Substantial portions of the Postal Service's outlay for labor, *i.e.*, most carrier costs, as well as virtually all building, equipment and vehicle costs were allocated in this manner.[3]

The Commission's Chief Hearing Examiner approved the Postal Service request with some modifications on the grounds that it was a reasonable first effort and that the record permitted development of no alternative system. He concluded, however, that the Act requires allocation of costs to the service classes causing them to the fullest extent possible and that the Postal Service's cost allocation methods did not yet reflect the full cost burdens of each class imposed on the system.[4] The Commission took a less exacting view, but concurred with the Examiner's description of the fundamental problem, and the Governors adopted the Commission's decision.

[2] The private express statutes, 39 U.S.C. § 601 *et seq.*, impose severe restrictions on the private carriage of letters and other types of first class mail and guarantee the Postal Service a virtual monopoly on the delivery of such mail. Criminal penalties for violations of these statutes are set forth in 18 U.S.C. §§ 1693-1699.

[3] *See* Chief Examiner's Initial Decision, Docket No. R71-1 (February 3, 1972) at 47-48.

[4] *Id.* at 29.

On review, the Court of Appeals did not disturb the Commission's decision out of deference to its initial efforts under a novel regulatory scheme and based on assurances of improved costing methods in the future. *Association of American Publishers, Inc.* v. *Governors of the United States Postal Service*, 485 F.2d 768, 777 (D.C. Cir. 1973). In a unanimous concurring opinion, however, the Court agreed with the Chief Examiner's conclusion that the Postal Service's limited effort at allocating costs on a cost of service basis, although perhaps a reasonable first effort, produced a result which was probably inconsonant with Congressional intent:

> Its [Congress'] stated intent to purge the postal system of "politics" provides a strong indication that the Chief Examiner was correct when he suggested that discretionary or "reasonable" assignment of costs should apply only where Postal Service simply *could not* "attribute" costs.

Id. at 779. In commenting on the inverse elasticity rule, the court agreed with the Chief Examiner's conclusion:

> Distributing billions of dollars on the basis of thinly supported judgments is not an acceptable method. And it is an invitation to pressures which Congress sought to avoid.

Id. at 778.

Case II (1973)—From 8¢ to 10¢ For First Class

All petitioners in the case now before the Court participated in the second rate proceeding (Docket No. R74-1) which commenced on September 25, 1973. The Postal Service rate request, which employed the same

allocation methods used in the first case, allocated an even smaller percentage of budget requirements on a cost of service basis. This Postal Service rate proposal was rejected by the Administrative Law Judge who concluded that it was feasible to trace substantially more costs to the classes of mail causing them as was required by the Act. Using Postal Service data, he was able to allocate 70.6 percent of all costs on a cost of service basis. As a result, he recommended an 8.5¢ first class rate instead of the 10¢ proposed by the Postal Service.[5] The Commission, with one dissent, rejected the Chief Administrative Law Judge's recommended decision and reinstated with some modifications the methodology proposed by the Postal Service. The Governors adopted the Commission's decision. This decision attributed only costs which were volume variable and employed the inverse elasticity technique to allocate the balance of the costs.

NAGCP appealed this decision to the U.S. Court of Appeals for the District of Columbia Circuit. *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976) ("NAGCP I (1976)"). Several of the petitioners in the instant case intervened in that appellate proceeding.[6] In *NAGCP I* (1976), the court held that the Act required Postal Service costs to be attributed to the greatest extent possible to the class of service which caused them and that limiting cost of service principles to costs which are short run volume variable was contrary to that requirement. The court found that the

[5] Chief Administrative Law Judge's Initial Decision on Postal Rate and Fee Increases, Docket No. R74-1 (May 28, 1975) at 12-13.

[6] These included American Business Press, Inc., National Newspaper Association, and Association of American Publishers, Inc.

inverse elasticity method of allocating costs based on subjective estimates of what the traffic will bear was similarly impermissible under the Act and unduly burdensome on first class mailers. The court did not, however, attempt to prescribe any specific cost allocation methodology as being most responsive to the underlying purposes of the Act. The court held that "to be acceptable, a methodology need only be reasoned, nonarbitrary and permissible under the statute." *Id.* at 591. A Postal Service request for a rehearing *en banc* was denied. No party sought this Court's review of the decision in *NAGCP I* (1976).

Case III (1975)—From 10¢ to 13¢ For First Class

The third proceeding (Docket No. R76-1) commenced on September 18, 1975, before a decision had been rendered in NAGCP I (1976). Dispensing with a hearing examiner, the Commission conducted all proceedings *en banc*. Its final decision was based on the same methodology as employed in prior ratemaking proceedings, and NAGCP appealed that decision. The appeal, which was pending when *NAGCP I* (1976) was decided, was dismissed for mootness when yet another rate proceeding commenced. *National Association of Greeting Card Publishers* v. *United States Postal Service*, No. 76-1611 (D.C. Cir. *dismissed per curiam* June 27, 1978) ("NAGCP II").

Case IV (1977)—From 13¢ to 15¢ For First Class

The fourth and latest proceeding (Docket No. R77-1) commenced on July 13, 1977. Consistent with the decision in *NAGCP I* (1976), the Postal Service filed a rate request which allocated 73.5 percent of all costs to the classes of mail service causing them. To allocate those

costs, the Postal Service relied on various reasonable inferences, including but not limited to direct volume variability. The remaining 26.5 percent of costs was allocated based on non-cost factors. The Commission adopted this proposal with only minor modifications, and the Governors again endorsed the recommended decision of the Commission.

Numerous parties, including respondent NAGCP, appealed from the Commission's action, complaining about various aspects of the decision, most of which are not at issue in this court. *National Association of Greeting Card Publishers* v. *United States Postal Service,* Case No. 78-1448 (D.C. Cir. 1979) ("NAGCP III (1979)"). The court below, after reviewing the history of proceedings under the Act and its rulings in prior cases, rejected each challenge to the Commission's decision, finding the Commission's approach reasoned, nonarbitrary and consistent with statutory intent. It therefore affirmed.

REASONS WHY THE WRIT SHOULD BE DENIED

I. This Case Presents No Important Question of Federal Law or Conflict with Decisions of This Court

Petitioners argue that the court below incorrectly decided an important question of federal law which this court should now settle. That question of law is whether the Act permits the Commission to ignore cost of service concepts except for those costs which are directly volume variable and to allocate all of the very substantial remaining costs based on the "inverse elasticity rule." This question of law is not squarely presented in *NAGCP III* (1979) and, in any event, does not warrant consideration by this Court.

A. Petitioners are seeking review of the decision in NAGCP I (1976), not NAGCP III (1979)

Petitioners are seeking review in the wrong case. Their "important question of law" is not directly presented by the decision in *NAGCP III* (1979); it was decided three years ago in *NAGCP I* (1976). In that case the court, following a thorough examination of the language of the Act, its legislative history and the 16,000 page Commission record, determined that both the plain reading of the statute and its legislative history compel the conclusion that the Commission is required to trace the cost consequences of providing each class of service and to allocate costs on that basis as far as reasonably possible.

In *NAGCP III* (1979), the court below was confronted with a different issue. There, the Commission had, in fact, allocated 74.5 percent of all Postal Service costs on the basis of cost of service principles. The court's review was limited to determining whether the particular methodologies selected by the Commission were reasoned, nonarbitrary and permissible under the Act. While the court did discuss some of the principles enunciated in *NAGCP I* (1976), it was in the context of determining whether the specific formulas adopted by the Commission for allocating costs to the classes causing them were supported in the record and permissible under the Act.

B. Petitioners present no special or important reasons requiring the exercise of the Court's discretionary jurisdiction

NAGCP III (1979) presents a poor vehicle for review of the decision in *NAGCP I* (1976). That decision was open to direct review, and no petitioner has sug-

gested any cogent reason why review was not sought.[7] Surely if the legal principle involved is as critical to the financial well-being of the Postal Service as argued by petitioners, certiorari would have been sought in *NAGCP I* (1976).

Petitioners nonetheless argue that the holding in *NAGCP I* (1976) threatens the solvency of the Postal Service. They contend that newspaper, magazine and book publishers, record distributors and others who are free to use alternative means of delivery because they are not covered by the private express statutes will cease using the mails if they are asked to pay rates which fully reflect the costs of providing service to them. This diversion of business, petitioners argue, will result in deficits for the Postal Service and eventually shift greater cost burdens to first class mailers, who by law have no alternative to the mails. NAGCP, which would have the most to lose if this occurred, does not agree.

Petitioner's dire predictions of financial havoc and insolvency resulting from the NAGCP I (1976) decision are baseless. In fact, the Postal Service recently announced that for the first time since 1945, it expects

[7] Three of the eight petitioners now seeking review of *NAGCP III* (1979) were intervenors in *NAGCP I* (1976) and thus clearly entitled to seek certiorari in that case. All other petitioners had participated in the Commission proceedings which culminated in *NAGCP I* (1976) but did not appear as parties in the appellate proceedings. Although a non-party generally does not have standing to file a petition for certiorari, the Court has allowed such a petition where the non-party is the real party in interest adversely affected by the decision. *See, e.g., Banks* v. *Chicago Grain Trimmers Assoc., Inc.*, 389 U.S. 813 (1967). None of these petitioners even attempted to apply for certiorari.

a revenue *surplus* which will total approximately $400 million in fiscal 1979.[8]

Moreover, the cost assignments challenged in this case involve only 7.14 percent of the Postal Service's total revenue requirement.[9] Almost 65 percent of total costs was attributed on the basis of volume variability, the methodology used by the Commission in prior rate cases. Twenty-eight percent of total costs (4.9 billion dollars) was allocated using non-cost factors and other considerations. Only the remaining seven percent was allocated using the methodologies challenged in *NAGCP III* (1979). Although the absolute dollar amounts are large because every Commission decision affects millions or even billions of dollars in postal revenue, that fact alone cannot justify this Court's consideration of this case. If large dollar amounts were enough, every Commission ratemaking decision would be appropriate for review.

The greater paradox in petitioner's reasoning is that it is *not* the first class mailers seeking review in this case. Petitioners are those very magazine publishers and record distributors who, we are told, might abandon the Postal Service if they are forced to bear their full share of costs. The only party to these proceedings representing the views of first class mailers is respondent NAGCP, which has consistently argued *for* the

[8] Speech by Postmaster General William F. Bolger before Postal Forum East, Niagara Falls, N.Y. (Oct. 16, 1979).

[9] While NAGCP does not agree that the cost assignments in the Commission Opinion were appropriate, NAGCP has not challenged them on appeal. In future proceedings, NAGCP will advocate more refined attribution.

result in *NAGCP I* (1976). One can only conclude that it is a lower postal rate for petitioners, not the viability of the Postal Service nor the predicted higher rates for first class which are actually at stake in this case. However, this court does not sit for the benefit of particular litigants. *Rice* v. *Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955).

II. NAGCP I (1976) Was Properly Decided

A. The court's interpretation of the Act was correct

The decision in *NAGCP I* (1976) was correct.[10] It focused on 39 U.S.C. § 3622, the section of the Act which sets forth the factors that the Commission must take into account in setting rates, and gave effect to subsection 3622(b)(3) which establishes

> the *requirement* that each class of mail or type of mail service bear the *direct and indirect* postal costs *attributable to* that class or type plus *that portion* of all other costs of the Postal Service reasonably *assignable* to such class or type (emphasis added).

The *NAGCP I* (1976) court concluded that only one interpretation of § 3622(b)(3) gives meaning to all its terms. The court found that the use of the word "requirement" (and its absence in all other ratemaking factors) implied preeminence of the cost of service concept conveyed in § 3622(b)(3). The phrase "direct and indirect . . . costs" necessarily suggested allocation of

[10] To date, the underlying principle of that decision has been espoused by three different panels of the D.C. Circuit (two of them unanimously) and twice by the Commission's Chief Hearing Examiner. Only the Commission itself has disagreed.

costs beyond those which are directly volume variable and implied some form of cost accounting analysis. The phrases "costs attributable to" and "assignable to" buttressed the implied use of cost accounting concepts. Reference to "that portion of all other costs" indicated that the drafters contemplated a residuum of costs—the remainder after the assignable portion is identified—to be allocated based on non-cost factors. *NAGCP I* (1976), 569 F.2d at 585-587.

The legislative history of the Act bolstered the court's reading of the statute. *NAGCP I* (1976), 569 F.2d at 587-89. A "central and express" aim of both Houses of Congress was to reduce the subjectivity and discretion inherent in the prior political ratemaking process.

> [If] postal rates and postal classification are going to be established on a basis of charging *whatever the traffic will bear* to a particular class of mail according to its ability to pay, what kind of an increase it got last time, or its "social acceptability," then Congress is clearly better qualified to make such judgments than the Postal Service or any expert commission. Such purely political judgments are the province of Congress.

S. Rep. No. 91-912, 91st Cong., 2d Sess. 11 (1970). (Emphasis added.)

Another principal feature of prior ratemaking procedures—one Congress clearly intended to eliminate—was the imposition of discriminatorily high rates on first class mailers, who were bound by law to the postal system. The problem was concisely epitomized by Senator McGee, sponsor of the Senate draft of the legislation:

> Most of the money in the postal system comes from first class mail. A 100% increase in the rate

> for all second class mail would not produce as much revenue as a 5% increase in the first class rate. The temptation to resolve the financial problems of the post office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing the imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.

S. Rep. No. 91-912, 91st Cong., 2d Sess. 13 (1970).

The Senate bills (S. 3613 and S. 3842) specifically forbade undue discrimination and would have abolished most rate preferences. All of the mail classes were to bear their costs of service, with the increases for some formerly preferred classes to be phased in over five and ten year periods to cushion the change to cost based rates.[11] The Committee version of the bill directed the Commission to set rates reflecting the "operating costs, the amount of overhead, and other institutional costs of the postal service properly assignable to each class of mail." S. 3842, 91st Cong., 2d Sess. § 3704(b).

In contrast, however, the House bill provided for special preferences for certain second, third, and fourth class mailers. H.R. 17070, 91st Cong., 2d Sess. (1970) at § 1202(e). With respect to distribution of postal costs, the House Bill provided merely that each class of service would bear "those costs demonstrably related to it." *Id.* at § 1201(c). When the House and Senate conferees met in conference, the Senate conferees agreed to write the rate preferences of 39 U.S.C. § 3626 into the Act, and the House conferees in turn

[11] *See* S. 3613, 91st Cong., 2d Sess. (1970) at § 3703(e); S. 3842, 91st Cong., 2d Sess. (1970) at § 3704(i).

accepted a cost standard requiring attribution of costs as far as reasonably possible.

In *NAGCP I* (1976), the court found that the Commission decision before it effectively perpetuated prior practice. Under the guise of the "inverse elasticity rule," the Commission had approved the Postal Service allocation of 52.5 percent of its operating budget on the basis of the unstructured and virtually unreviewable judgment of two men as to what the traffic would bear. The Court concluded that:

> . . . [i]t would be anomalous to construe subsection 3622(b)(3) as permitting a grudging use of cost-of-service principles which, by expanding the residuum of costs subject to discretionary allocation, simply preserves the potential treatment that the Act so clearly intended to remedy.

NAGCP I (1976), 569 F.2d at 589.

Petitioners' arguments that the legislative history of the Act does not support the result in *NAGCP I* (1976) are based on a false premise. They equate the Cost Ascertainment System condemned by the Kappel Commission with *NAGCP I's* requirement of reasonable allocation of costs to those classes of mail which cause them. They are not the same. The Cost Ascertainment System was a specific forty-year-old system which apportioned *all* costs to various classes of mail regardless of whether those classes in any sense caused the costs in question.[12] *NAGCP I* (1976) nowhere espouses this practice and indeed repeatedly emphasizes that the Act requires attribution and assignment only of those costs which are the consequences of pro-

[12] Chief Examiner's Initial Decision, *supra* note 3, at 47-48.

viding a particular service. *NAGCP I* (1976), 569 F.2d at 590-93. In *NAGCP III* (1979) only 74.5 percent of all costs were allocated on causation bases.

Furthermore, Congress did not enact the Kappel Commission Report *in toto*. There were substantial differences between the Report and the language of the subsequent legislation; one of the areas of change was the very language at issue here. Thus, the Kappel Commission Report offers little guidance as to the intent of Congress on this point.[13]

Petitioners also argue that *NAGCP I* (1976) must be incorrectly decided because it leaves no room for the eight non-cost rate making factors in § 3622(b). But, as noted by the Postal Service in its brief to the Commission, "*NAGCP I* plainly permits significant residual costs to remain after costs have been attributed and assigned." [14] In *NAGCP III* (1979) that residuum equalled 4.5 billion dollars or 25 percent of Postal Service operating costs. Indeed, it is the inverse elasticity rule which petitioners espouse which effectively eliminates all other factors, allocating costs to those with no option to go elsewhere rather than on the basis of the equities recognized in the other subsections.

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[13] With respect to petitioners' arguments as to the effect of statements of legislators in the House of Representatives in 1976, these contentions were rejected twice by courts below and by the Commission itself (PRC, Vol. 1, 75), and in any event, are without substance as a matter of law. *See, e.g., United States* v. *Wise,* 370 U.S. 405, 411 (1962); *National Citizens Committee for Broadcasting* v. *F.C.C.,* 555 F.2d 938, 952 n.41 (1977).

[14] United States Postal Service Reply Brief to the Postal Rate Commission, R-77-1 (March 17, 1978) at 10.

B. The court's decision did not exceed allowable limits of judicial review

Petitioners argue that the court below did not afford the Commission's interpretation of the Act the deference to which it was entitled and, instead, imposed upon the Commission the court's own selection of an appropriate cost allocation methodology. That is, of course, a reference to *NAGCP I* (1976), not this case. In this case, the Commission methodology was upheld. In any event, while the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on issues of statutory construction. *Zuber* v. *Allen,* 396 U.S. 168, 193 (1969); *F.T.C.* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385 (1965). Courts are not obliged to stand aside and rubber stamp administrative decisions inconsistent with the plain meaning of a statute or congressional policy underlying it. *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291 (1965); *Hagger Co.* v. *Helvering,* 308 U.S. 289, 398 (1940). *See also Espinoza* v. *Farah Manufacturing Company, Inc.,* 414 U.S. 86, 94 (1973); *Volkswagenwerk Aktienge-Sellschaft* v. *Federal Maritime Commission,* 390 U.S. 261, 272 (1968). To have accepted the Commission's decision in *NAGCP I* (1976) would have been to disregard the clear and unequivocal intent of Congress found in the Act and its legislative history. It was the duty of the court to give full effect to that intent.

Furthermore, the Commission's decision in *NAGCP I* (1976) was based on its interpretation of the Act and did not result from its application of expert knowledge or judgment to a highly technical field. Deference to administrative construction is not overriding where the question does not rest upon technical matters pe-

culiarly within the agency's field of expertise. *Thompson* v. *Clifford,* 308 F.2d 154, 167 (D.C. Cir. 1968); *March* v. *United States,* 506 F.2d 1306, 1316 (D.C. Cir. 1974).

Once the *NAGCP I* (1976) court determined that the Commission's interpretation of the Act was demonstrably wrong, it had no option but to reject the Commission's decision. Having done that, however, both the court and the *NAGCP III* (1979) court have followed this Court's teachings and refrained from imposing any particular cost allocation methodology. The Postal Service itself has observed that the *NAGCP I* (1976) decision "clearly leaves room for proper exercise of judgment and discretion in assigning costs." [15] Indeed, it has argued that the court did not give it *enough* guidance as to appropriate methodologies under the Act.[16]

The decision in *NAGCP I* (1976) requires only a reasoned, nonarbitrary cost methodology designed to produce rates which reflect as closely as possible the costs of providing each class of service.[17] While limita-

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[15] Postal Service Reply Brief to Postal Rate Commission, R77-1 (March 17, 1978) at 6. *See also* Postal Service Brief to Postal Rate Commission, R77-1 (March 7, 1978) at 112-113.

[16] Appellee's Petition for Rehearing at 10-13, *NAGCP I* (1976).

[17] Petitioners attempt to build an argument to the contrary upon that portion of the court's opinion where it distinguishes between attributable and assignable costs, arguing that the court was dictating methodology. But, as indicated by its discussion of this point in NAGCP III (1979), the court was not trying to compel any hard rules on allocating costs between these two categories, but only to make clear that to the extent costs are caused by a classs of mail, the statute requires that they be borne by that class, whether on the basis of attribution or assignment. *NAGCP III* (1979) at 29-31.

tion of cost of service considerations to direct short run volume variability and predominant reliance on the concept of inverse elasticity have been rejected because they do not achieve the result intended by the Act, great discretion remains in the Postal Service and the Commission to devise an appropriate methodology to accomplish the statutory goal. Indeed, the allocation methodologies employed by the Commission in *NAGCP III* (1979) were selected by the Postal Service from numerous alternatives.

CONCLUSION

The principles established in *NAGCP I* (1976) have been applied in a subsequent ratemaking proceeding and reiterated by the court in *NAGCP III* (1979). Petitioners have presented no compelling reason to disturb either of those decisions. The practical effect of granting review will be to upset previously determined rates and fees and needlessly add confusion and uncertainty.

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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October 26, 1979

Nos. 79-377, 79-378 and 79-379

DEC 11 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

DOW JONES & COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

MAGAZINE PUBLISHERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

AMERICAN BUSINESS PRESS, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A95)[1] is not yet reported. The decision of the Governors of the United States Postal Service (Pet. App. B4-B9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1979. The petitions for a writ of certiorari were filed on August 31, 1979 (No. 79-377) and September 6, 1979 (Nos. 79-378 and 79-379). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the postal rates and fees recommended by the Postal Rate Commission and approved by the Governors of the Postal Service are consistent with the Postal Reorganization Act of 1970, 39 U.S.C. 101 *et seq.*

STATEMENT

This action arises out of the most recent general postal rate proceeding conducted by the Postal Rate Commission (Commission). The Commission's decision recommending new rates was approved by the Governors of the Postal Service (Governors), whose decision was affirmed by the court of appeals. Petitioners seek review of that judgment.

To place in perspective the questions that petitioners present and the position of the Postal Service, we first summarize the statutory framework and prior litigation in this area. When Congress enacted the Postal Reorganization Act, 39 U.S.C. 101 *et seq.* (the Act), in 1970, it relinquished the control it had traditionally exercised over the setting of postal rates and fees and the establishment of mail classes. Instead, it established the United States Postal Service (USPS) and the Commission as agencies independent of each other, each with a role in setting rates.

Under 39 U.S.C. 3622, the Postal Service initiates a rate proceeding by requesting the Commission to recommend changes in rates or fees when "the Postal Service determines that such changes would be in the public interest." The Postal Service submits proposed rates with its request. *Ibid.* After receiving the request, the Commission holds hearings on the proposed rates (39 U.S.C. 3624(a)) and then recommends a decision to the Governors (39 U.S.C. 3624(d)). The Governors may approve a decision recommended by the Commission, allow it under protest, reject it, or (in certain circumstances) modify it (39 U.S.C. 3625). A decision of the Governors that orders rates into effect may be appealed to any court of appeals by "an aggrieved party who appeared in the proceedings under [39 U.S.C.] 3624(a)" (39 U.S.C. 3628).

The Commission does not possess unfettered discretion in arriving at the rates it recommends to the Governors. 39 U.S.C. 3622(b) specifies nine considerations—in addition to the more general one of "the policies of [the Act]"—which must guide the Commis-

[1] "Pet. App." refers to the petition in No. 79-378.

sion in recommending changes in rates and fees. These factors reflect the breadth of Congress' concerns. There are eight "non-cost" factors (*e.g.*, the availability of other means of communication; the effect on competing enterprises; the social, cultural, and educational value of the mail) and, of particular relevance here, one "cost" factor: "the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type" (39 U.S.C. 3622(b)(3)).

The postal rate proceeding involved in this case is the fourth such proceeding conducted by the Commission under the Act. Although each of the four proceedings established rates and fees for dozens of mail subclasses and special services, the four proceedings are most conveniently identified by the rate each established for the first ounce of first-class mail. The first proceeding, which established the eight-cent rate, was Docket No. R71-1. The United States Court of Appeals for the District of Columbia Circuit reviewed the Governors' decision and affirmed it. *Association of American Publishers, Inc.* v. *USPS*, 485 F.2d 768 (D.C. Cir. 1973).

The second proceeding, Docket No. R74-1, established the 10-cent rate. The National Association of Greeting Card Publishers (NAGCP) sought statutory review in the court of appeals. While that case was under consideration, the Commission was con-

sidering the third rate case, Docket No. R76-1, which involved a 13-cent rate. The Governors adopted the 13-cent rate recommended by the Commission on July 7, 1976. NAGCP sought review of that proceeding in the court of appeals, which was still considering NAGCP's appeal from the second (10-cent rate) proceeding.

The court of appeals issued its decision in the 10-cent rate proceeding on December 28, 1976. *National Association of Greeting Card Publishers* v. *USPS*, 569 F.2d 570 (D.C. Cir.), vacated as to other issues, 434 U.S. 884 (1977) (*NAGCP I*). The court recognized that the superseding 13-cent and related rates had been in place for five months but found that NAGCP's original appeal was not moot. The court concluded that the question was "capable of repetition, yet evading review" and held that the case or controversy prerequisite to federal jurisdiction was satisfied. 569 F.2d at 578 n.21; Pet. App. D14-D15 n.21.

On the merits, the court rejected the costing and pricing methodologies that the Postal Service and the Commission used to differentiate "attributable" and "assignable" costs under 39 U.S.C. 3622(b)(3). See 569 F.2d at 580-593; Pet. App. D18-D47. In brief, the court found that the cost-variability approach they used resulted in "attributing" an insufficient amount of costs (52.5%). As the court of appeals explained (569 F.2d at 583; Pet. App. D26; footnote omitted):

> Whereas the linchpin of the cost variability approach is an abiding concern for the greatest possible accuracy in measuring causation, the * * * approach [of the Administrative Law Judge that the Commission and the Governors rejected] devalues somewhat the interest in utmost accuracy in order to pursue more fully the goal of maximized attribution. Simply put, the alternative approach relies on cost accounting principles to augment the inferences of causation derived through use of the cost variability theory. Additional attribution results from using distribution keys such as weight, volume and number of pieces of mail to apportion among the postal services affected those cost segments which clearly affect more than one service and which, although not measurably variable on presently available data, are reasonably susceptible to such apportionment.

The court concluded that "the Act requires that special efforts be made to maximize the use of cost-of-service principles in the allocation of postal costs" (569 F.2d at 587; Pet. App. D35). However, because the 10-cent and related rates in *NAGCP I* had been superseded by the 13-cent and related rates some time before the *NAGCP I* decision issued, the court took no action to disturb the existing rates.

The Postal Service initiated the present proceeding, proposing a 16-cent rate, on July 13, 1977, some six months after *NAGCP I* was decided, by filing a request for a recommended decision with the Commission. On May 19, 1978, the Governors accepted the recommended decision of the Commission, ordered a

15-cent rate and related rates into effect, and terminated the administrative phase of the case. The Postal Service then moved the court of appeals to dismiss *NAGCP II* (13-cent rate) for mootness, and the court did so on June 27, 1978. *National Association of Greeting Card Publishers* v. *USPS*, No. 76-1611 (D.C. Cir.) (*NAGCP II*). NAGCP meanwhile initiated the present case—*NAGCP III*—by filing a petition for review of the Governors' May 19, 1978, decision. The court of appeals affirmed the Governors' decision (Pet. App. A2-A95), and the present petitions for a writ of certiorari followed.

ARGUMENT

1. The Postal Service believes that the approach that the court of appeals dictated in *NAGCP I* and adhered to in the present case is mistaken. Its position may be summarized as follows.

In the first two ratemaking proceedings following reorganization, USPS and the Commission interpreted 39 U.S.C. 3622(b)(3) as requiring USPS to allocate costs to classes of mail and types of service in two—and only two—steps: first, it must allocate those costs that are "attributable," either directly or indirectly, to a class of mail or type of service—that is, costs that are causally related to the service provided; and second, it must make a reasonable assignment, among classes of mail, of *all* other costs. The court of appeals, however, stated in *NAGCP I* that there is, in effect, a third category of costs: "Congress did not intend that *all* postal costs be either

attributed or assigned. * * * [S]ome Postal Service costs will exist but will not be 'reasonably assignable' to any particular class or type. The other factors enumerated in section 3622 will govern the allocation of these nonattributable and nonassignable costs." 569 F.2d at 587; Pet. App. D34 (emphasis in original). Thus, the third category comprised some of the costs that the Postal Service had previously included in the second—non-attributable—category of costs; conceptually the court made them merely an extension of attributable costs.[2]

The court explained this result by stating, first, that all costs that could be determined, through reasonable inferences of causation, to be the consequence of providing a service must be attributed to that service. Then, as to the new conception of costs that it announced, the court said that a portion of remaining costs must be assigned to the various classes of mail "to the extent that it can reasonably be determined or estimated that certain classes of service may account for particular costs." 569 F.2d at 586; Pet. App. D32. The court, attempting to distinguish between attributable costs and its new definition of assignable costs, said that while both involved "inferences of

[2] As a result, in the instant rate proceeding more than $1 billion in postal costs were distributed to classes of mail on the bases of inferences that are lawful under *NAGCP I*, but that involve considerably more judgment and estimation than the Commission or the Postal Service, in the exercise of their expertise, had considered to be appropriate under the Act. In future ratemaking proceedings, appreciably larger amounts of postal costs can be expected to be distributed to the classes of mail on the bases of such inferences.

causation," assignable costs permit "a greater degree of estimation" and connote "somewhat more judgment and discretion." 569 F.2d at 587 n.59; Pet. App. D34 n.59. Finally, the court held that it is only the residuum of costs that is subject to discretionary allocation in accordance with the eight non-cost (pricing) factors of Section 3622(b). 569 F.2d at 592; Pet. App. D46.

The court of appeals reached these conclusions because it regarded Section 3622(b)(3) as "strengthened from a guideline into the only 'requirement'" among the rate-setting factors in Section 3622. 569 F.2d at 588; Pet. App. D34.[3] The court relied on its reading of the legislative history to reinforce its conclusions. The Postal Service believes that a more accurate analysis of the legislative history is contained in the petition filed by Magazine Publishers Association, Inc., and Time Incorporated (see 79-378 Pet. 18-26), and that this history demonstrates that the court of appeals in *NAGCP I* misconstrued the Act.

The Postal Service believes, contrary to the court of appeals, that the language and history of the Act demonstrate that Congress envisaged only two types of postal costs: "attributable" costs, which are causally related to the service provided, and *all* other

[3] In a separate opinion, Judge MacKinnon criticized the majority for having over-emphasized cost of service as the basis for rates and having "read out of existence" the non-cost factors that Congress had included in Section 3622(b). 569 F.2d at 603, 606; Pet. App. D72, D77-D78 (MacKinnon, J., concurring).

costs, which are to be "assigned" to classes of mail on a reasonable, value-of-service basis, determined by the non-cost factors of Section 3622(b). The court of appeals has held that, after attributable costs are allocated, remaining costs that can "reasonably" be assigned to various mail classes, on a cost-of-service basis, are to be so assigned. Only those costs that cannot be reasonably assigned on a cost-of-service basis are to be assigned on a value-of-service basis in accordance with the non-cost factors of Section 3622 (b)(3).

Although the Postal Service complied with the three-cost configuration in the present case, it continues to believe that the result of such compliance will deprive it and the Commission of the pricing flexibility that Congress intended them to have when it specified, in Section 3622(b), eight non-cost factors for the Commission to consider in addition to the cost factor of Section 3622(b)(3). The Postal Service believes that this loss of flexibility will make it difficult to provide the public with diverse postal services at reasonable rates, as Congress intended.[4] Barring a complete change of course by the court of appeals, this Court is the only forum for judicial relief. In the meantime, the Postal Service is of the view that it cannot responsibly ignore the court of appeals' approach in setting future rates, for that court's almost-

[4] Indeed, the court of appeals conceded that its approach, unlike that of the Commission rejected in *NAGCP I*, would not maximize the efficient allocation of resources (Pet. App. A26-A27).

certain disapproval of any rates not promulgated in accordance with the principles announced in *NAGCP I* would throw the entire postal rate picture into uncertainty.

2. The essence of petitioners' position is that *NAGCP I* was wrongly decided. See 79-377 Pet. 15-19; 79-378 Pet. 14-18; 79-379 Pet. 8-15. For the reasons stated above, the Postal Service agrees.[5] By imposing on the Commission and the Governors a cost methodology that is inferior to the one they originally adopted and still prefer, *NAGCP I* unduly restricted the statutory authority of the Commission and the Governors to set postal rates.

NAGCP I, however, is not before this Court. The decision in the present case, although it adheres to the principles established in *NAGCP I*, is a separate decision that upholds certain rates set by the Commission and approved by the Governors. Those rates were determined in light of *NAGCP I*, and although the Commission and the Governors had misgivings about the wisdom of their compelled course,[6] the Postal Service defended the rates, and the methodology used to arrive at them, as lawful in the court of appeals.[7]

[5] The government did not seek review of *NAGCP I* in this Court because the rates involved there had been superseded by newer rates and thus the question presented had, in our opinion, become moot.

[6] See Pet. App. B6.

[7] In the court of appeals, the Postal Service defended the rates as "an appropriate response to *NAGCP* I" and based on "substantial evidence" (Br. 11; footnote omitted; see also Br.

Thus, in our view, the postal rates now subject to review are not contrary to the statute. The methodology employed is within the statute, in the sense that, had the postal authorities originally devised it, the resulting rates would be lawful.[8] The fact that USPS and the Commission adopted the methodology, and set the rates, based on the court of appeals' construction of the statute rather than their own does

---

39). Perhaps most significant, USPS argued to the court of appeals that the administrative decision—specifically including the cost-allocation aspect of those decisions—were consistent with the Postal Reorganization Act as interpreted in *NAGCP I*. (Br. 9, 59-60). In this regard, USPS stated (Br. 59-60; footnotes and citations omitted):

> Agency actions are subject to judicial review. Judicial actions on review are not thereafter subject to agency review. Although an agency's construction of technical terms in a statute may be entitled to deference from the court, it is for the court to decide whether or not the agency has correctly applied the statute. The Court's *NAGCP* I decision, that the Commission had not correctly applied the Act in Docket No. R74-1 and directing the Commission how the Act should be applied, is now the law. The Court having interpreted the Act, it is beyond the Commission's power to re-interpret it.

And USPS concluded its brief by stating (Br. 74):

> The theory and application of service-related costing are a rational implementation of the *NAGCP* I interpretation * * *, an interpretation which binds the Commission and the Postal Service. The specifics of service-related costing were exhaustively tested on the record.
>
> Nor do [petitioners'] exaggerated legal constructions demonstrate that the decisions of the Commission and the Governors were outside the scope of their discretion and the applicable law.

[8] See Pet. App. A28-A46; NAGCP Br. in Opp. 14-18.

not make the methodology, or the rates, any the less lawful.

Although the Postal Service continues to believe that the methodology dictated by *NAGCP I* is not the only methodology the statute allows and that it and the Commission should be free to utilize the discretion that Congress entrusted to them, it sees no reasonable likelihood that the court of appeals, in future rate proceedings, will retreat from the principles it announced there and reiterated here. The Postal Service is thus faced with two equally unattractive alternatives. It may continue to set rates in accordance with principles that it finds unacceptable (albeit lawful), or it may set rates that will almost certainly be struck down by the court of appeals, thus jeopardizing a complex and comprehensive postal rate scheme that involves billions of dollars annually. Whatever course the Postal Service may choose in the future, however, the fact remains that the rates petitioners challenge are lawful, and the government therefore cannot acquiesce in petitioners' suggestion that this Court review and, ultimately, overturn them.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 79-377, 79-378 and 79-379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DOW JONES & COMPANY, INC.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

NATIONAL NEWSPAPER ASSOCIATION

ASSOCIATION OF AMERICAN PUBLISHERS, INC.

RECORDING INDUSTRY ASSOCIATION OF AMERICA

Petitioners,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

REPLY TO BRIEFS IN OPPOSITION

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UNITED STATES POSTAL SERVICE,
Respondent.

REPLY TO BRIEFS IN OPPOSITION

The briefs submitted by the Government and by two private parties in opposition to petitions for writ of certiorari of Dow Jones & Company, Inc., in No. 79-377 and petitioners in Nos. 79-378 and 79-379, underscore the importance of the issues presented, and emphasize the need for review by the Court of the decision below.

In particular, the Government's brief submitted in response to a communication from the Clerk confirms the continuing view of the Postal Service that:

(a) The language and legislative history of the Postal Reorganization Act of 1970, 39 U.S.C.

101 *et seq.*, have been misconstrued by the court of appeals (p. 9);

(b) The insistence of the court below upon the methodology it has prescribed deprives the Postal Service and the Postal Rate Commission of the pricing flexibility that Congress intended them to have (p. 10; 13);

(c) The court of appeals approach, "unlike that of the Commission rejected in *NAGCP I*, would not maximize the efficient allocation of resources" (p. 10, n. 4); and

(d) "Barring a complete change of course by the court of appeals, this Court is the only forum for judicial relief" (pp. 10-11).

These elements insistently call for review by this Court.

Nevertheless, on the assertion that the rates themselves are lawful, the Court is advised that "the government therefore cannot acquiesce in petitioners' suggestion that this Court review and, ultimately, overturn them." (p. 13). But, the questions of whether this Court should review the decision below, and whether it should ultimately reverse that decision and overturn the rates are separate and distinct. Given the manifest importance of the issues raised by the petitions, review by this Court which will resolve the Postal Service's present intolerable dilemma is undeniably in the public interest. The Postal Service should no longer be confronted with the two "equally unattractive alternatives" described in the Government's brief — "setting rates under principles that it finds unacceptable, or else setting rates that will almost certainly be struck down by the court of appeals" thereby jeopardizing the entire multi-billion dollar postal rate scheme (p. 13).

Moreover, although it is not necessary to establish at this stage of the proceedings that the postal rates presently under review are unlawful and should be set aside, the Government's contention that these rates are "lawful" is erroneous for two separate reasons:

First, the assumption that the Postal Service would have *discretion* to adopt the costing scheme which was *required* by the court of appeals is erroneous because "Congress envisaged only two types of postal costs . . ." (p. 9; see also p. 7 and the petition in No. 79-378, pp. 18-26 which the Postal Service endorses), rather than three segments which were in fact utilized in determining these rates (p. 8).

Second, the rates established in this proceeding are not lawful, for they were formulated under the compulsion of *NAGCP I*, rather than on the basis of the judgment of those expert officials to whom the responsibility was committed by Congress. That a decision which results from such a "compelled course" (p. 11) is not "lawful" even if the result could otherwise be sustained is a familiar and fundamental principle of administrative law which received its classic, and since unquestioned articulation over 35 years ago in *SEC v. Chenery Corp.*, 318 U.S. 80, 88:

> If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of

affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

Respectfully submitted,

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